

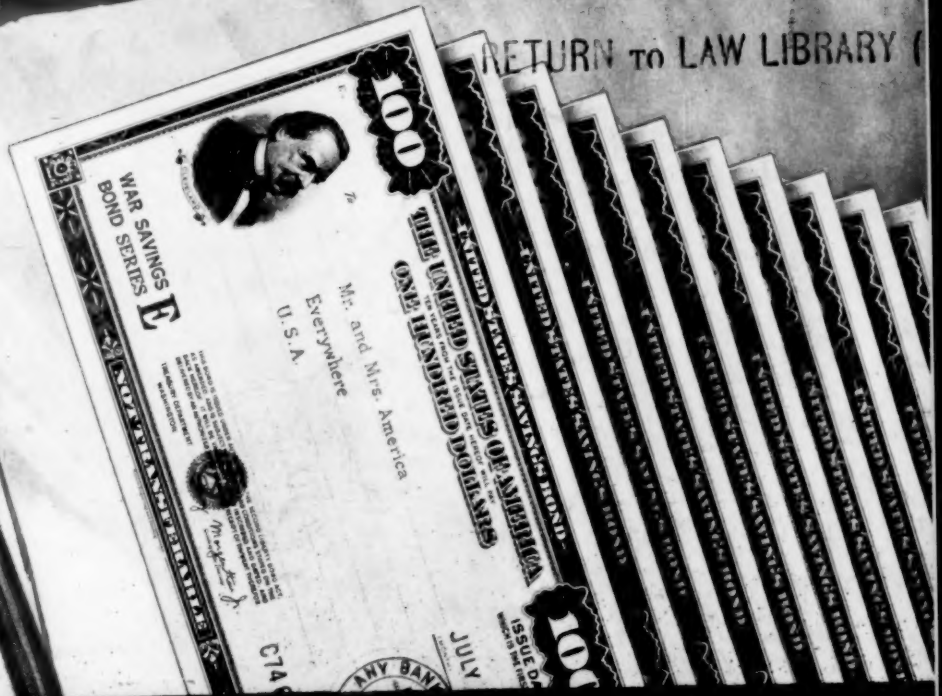
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There is . . . "a time to laugh" . . .

Ecclesiastes 3:4

A luckless private, weary and woebegone, ducked into a foxhole in the southwest Pacific, barely in time to dodge a Jap barrage.

Sitting there in mud and water to his waist, he wailed dismally, "Oh-h-h, I wisht I was a civilian!"

At this point he realized for the first time that he was sharing shelter with another. Turning his head a bit he observed the insignia of a major on his companion's shoulder. Somewhat disconcerted, he added lamely, "I-I mean, sir, a postwar civilian!"

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"Oh, they're all right, but we have branding corrals in Texas that are bigger," he said.

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Memory training by association became a fad in a certain school. "For instance," the English teacher was explaining, "if you want to remember the name of the poet, Bobbie Burns, you might conjure up in your eye a picture of a London policeman in flames. You see, 'Bobbie Burns'."

"I see," said one of the pupils, "but how is one to be sure that it doesn't represent 'Robert Browning'?"

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Why worry about manpower shortages?

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IN THIS ISSUE

Our Cover—This month our historian gives us an inspirational piece in "The Battle Cry of Democracy" for our War Bond issue.

Mr. George R. Farnum, who has been contributing a valuable series of articles on soldier-lawyers in the Revolutionary and Civil Wars for the Journal, is a lawyer of prominence who has had wide experience as a trial lawyer, and is the author of many articles on legal, social, and philosophical subjects. On May 22 Mr. Farnum, former Assistant Attorney General of the United States, was elected professor of law on the Faculty of the Law School of Suffolk University. It is expected that Mr. Farnum will begin his teaching duties in the coming fall.

Two Federal Legislatures?—"Who shall make our laws or amend the Constitution—Justices of the Supreme Court, chosen for life to be beyond the tendencies of the weather vane, or Congressmen and Senators, who are supposed to reflect the changing demands of the people, or the people themselves?" Walter Gordon Merritt of the New York Bar asks this question in his article, "Two Federal Legislatures?" In this diorism on the evolution of judicial legislation, Mr. Merritt discusses the benefits and the dangers of the revolutionary change in governmental attitude, and warns us that we should not place temporary expediency above fundamental principles "If law and order are desirable; and if our governmental structure of three coordinate branches is worth while."

Rationing Suspension Orders: A Reply to Dean Pound—In this issue, Richard H. Field, Jr., General Counsel of the Office of Price Administration, with the assistance of Fleming James, Jr., Director of the Litigation Division, and Harry L. Shniderman, gives us an article "Rationing Suspension Orders: A Reply to Dean Pound." This was written as an answer to "The Challenge of the Administrative Process"

by Roscoe Pound, Dean Emeritus of Harvard University Law School. Sylvester C. Smith, Jr., Chairman of the American Bar Association's Committee on Administrative Law, comments on the two articles, and suggests further study on the discussion of procedure should result in amendments of the regulations and procedure fully promoting the important purposes of the agency.

Review of Supreme Court Decisions

—In this issue we review twenty-four opinions of the Supreme Court of the United States handed down from May 12 to June 12. The other opinions handed down before final adjournment and not yet reviewed will be dealt with in the August issue.

ANNUAL TOPICAL INDEX

In Volume 62 of the American Bar Association Reports there was printed a complete index of subjects dealt with in the first 23 volumes of the JOURNAL. In Volume 65 of the Reports and subsequent volumes, topical indexes of Volume XXIV of the JOURNAL and of each succeeding volume, have been printed. Reprints are available at \$1 each of the topical index of the first 23 volumes.

U. S. v. Saylor: In this case the Supreme Court held that state election officers conspiring to stuff the ballot box in a Congressional election are subject to prosecution under appropriate sections of the federal Criminal Code.

In *Mortensen v. U. S.*, the interpretation of the Mann Act was expounded and limited.

In *L. B. Steuart & Bro., Inc. v. Bowles, et al.*, it was held that under Title III of the Second War Powers Act, which gave the President authority to ration material or facilities for defense, the President was given power to allocate material and to issue suspension orders and to withhold

material from those who violate the regulations established.

An unusual number of important tax cases were decided, but space is lacking here to summarize them. They deserve close attention. The Section of Taxation lends the aid of its specialists to review tax cases. The Journal expresses appreciation for the valuable service rendered in the reviews of these tax opinions by Mr. Mark H. Johnson and Mr. Howard O. Colgan, Jr., both of New York City.

U. S. v. South-Eastern Underwriters Assn.: The Court held by a four to three vote that fire insurance business is interstate commerce and is within the purpose and scope of the Sherman Act.

Polish National Alliance of the United States of North America v. NLRB.: It was held that the extent to which the Alliance used interstate facilities of travel and transportation across state lines in the conduct of its business justified the application to that business of regulation in the respects provided in the National Labor Relations Act.

The Supreme Court held in *Lyons v. Oklahoma* that the question of whether a confession was voluntary or involuntary must be determined by the jury and the trial court and that the Supreme Court will not overturn a decision on that question unless the conceded facts are irreconcilable with the mental freedom at the time of the confession.

In *U. S. v. White*, it was held that the privilege against self-incrimination is a personal one for the protection of the individual and does not extend to a labor union, corporation or unincorporated organization.

In *Hartzel v. U. S.*, it was held that under the Espionage Act of 1917 the existence of a specific intent at the time of the alleged overt acts to cause insubordination or disloyalty in the armed forces or to obstruct the recruiting and enlistment services must be proved by the Government beyond reasonable doubt.

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* * * That some degree of continuity attaches to the word "maintain" when used as here, see *Smallwood v. Gallardo*, 275 U.S. 56, 61, 48 S.Ct. 23, 72 L.Ed. 152 and 26 Words and Phrases, Perm. Ed., pages 60, 61. 52 F.Supp. 158

The definition of the word "settlement," as relates to bill of exceptions, is carried into 39 Words and Phrases, Perm.Ed., 38, from several citations of authorities. It is said that the settlement of "a bill of exceptions means an agreement upon the bill between the trial judge and * * *."

47 N.E.2d 657 (Ohio)

The recent permanent edition of Words and Phrases, Volume 36, pages 297-348, devotes 52 double column pages to selected definitions taken from some 700 or more state and federal court decisions, wherein definitions of the term are given, among which are the following: * * *

133 P.2d 781 (Montana)

* * * For a multitude of decisions to the same conclusion see "Sentence" in 38 Words and Phrases, Permanent Edition, 597. * * *

110 P.2d 140 (California)

It seems to me that the dispute here revolves around the meaning to be given to the word "assume". Words & Phrases, Permanent Edition, Vol. 4, page 594, defines the word "assume" as "to take upon oneself."

24 N.Y.S.2d 846 (New York)

The appellant's brief contains a complete list, compiled, we are informed, from Words and Phrases, Permanent Edition, of every decision by an appellate court construing the term "Labor Dispute". Said list of cases appears in the report of this case.

199 So. 720 (Alabama)

The holding of the court as to the meaning of the term "wholly disabled" is epitomized in Words & Phrases, Vol. 45, Perm.Ed., p. 127, as follows: "'Total disability' or 'wholly disabled,' as used in an * * *"

296 N.W. 545 (No. Dakota)

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TWO FEDERAL LEGISLATURES?

By WALTER GORDON MERRITT

Of the New York Bar

When he departs from the letter of the law, the judge becomes a lawmaker.—Bacon

THOSE who have been close to industrial and social trends for over a quarter of a century have witnessed changes so far-reaching in social and political philosophy, and court decisions and legislation, as to startle even them, if they pause to look at the total. The most far-reaching of all of these has been the revolutionary change in law brought about by the Supreme Court of the United States without the intervention of Congress—a process which the late Samuel Gompers called “judicial legislation.” In 1907 he said: “Judicial usurpation has overreached itself. After all, America is not Russia.”¹ Since 1930 this evolutionary or revolutionary process, whatever it may be called, has been accelerated. What were rights protected by the Constitution have become statutory wrongs. What were once wrongful acts under earlier decisions of the courts have now become constitutional rights which neither state nor federal legislation can take away. Even though one believes, as I do, that much of this change is in the right direction, we may nevertheless challenge the authority of the judiciary as the proper branch of government to make the change.

Employer Formerly Empowered to Suppress Unions

Some illustrations will be illuminating. It was repeatedly held by the Supreme Court of the United States and generally by the highest courts of the different states, that the employer had an inalienable constitutional right to refuse to employ a union man or to demand, as a condition of employment, that the employee agree not to join a union.² That right was held to be embraced within the constitutional guarantee of liberty of contract. Injunctions could even be obtained against unions seeking to persuade an employee to disregard such an agreement because it was a wrongful act wilfully to induce another to breach a contract.³ State and federal acts making it unlawful for an employer to demand such anti-union contracts were declared by the courts, state and federal, to be invalid as an infringement of employers' rights.⁴ The employer was thus given the power to suppress unions and to punish

by discharge employees who gave aid or comfort to the union.

Rights of Unions Enlarged by Judicial Process

This has now changed. Today under the National Labor Relations Act and similar state laws—which formerly were held to be void and unconstitutional—an employer may be sent to prison if he persists in discriminating against a union man. Without a constitutional amendment it has now become unlawful to do what was a constitutional right a quarter of a century ago.

While, by judicial process, the rights of employers shrank, by the same process the rights of unions enlarged. That which was once illegal for a union to do has, by judicial alchemy, been transmuted into a constitutional right—and without legislation or constitutional amendment. Twenty-five years ago, or thereabouts, the federal courts held there could “be no such a thing as peaceful picketing, any more than there could be chaste vulgarity, or peaceful mobbing, or lawful lynching”⁵ and that “peaceful picketing was a contradiction in terms.”⁶ Statutes forbidding injunctions against picketing were of doubtful validity.⁶ Now this has been overturned. In the last few years the Supreme Court has held that peaceful picketing is a part of the constitutional right of free speech.⁷ No legislature, no municipal ordinance and no court decision—except another reversal by the Supreme Court—can now forbid that which a couple of decades ago was declared to be an unlawful act. In this respect state and cities have been deprived of the right of self-government and Congress is not free to respond to a popular demand.

Constitutional barriers to protect property have been razed and constitutional barriers to protect labor have been built on the same site. Where formerly there was a constitutional right to obstruct unions, there is now substituted a constitutional right to obstruct business. Formerly it was charged that under decisions of the Supreme Court “it is constitutional for corporations to discriminate against union men but unconstitutional for

1. American Federationist, April, 1907, p. 258.

2. *Adair v. U. S.*, 208 U. S. 161 (1908) *Coppage v. Kansas*, 236 U. S. 1 (1915).

3. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229 (1917).

4. There were many state decisions. See federal cases, note 2.

5. *Atchison v. Gee*, 139 Fed. 582 at 584 (1905).

6. *Truax v. Corrigan*, 257 U. S. 312 at 340 (1921).

Am. Steel Foundries v. The Tri City Central Trades Council, 257 U. S. 184 (1921).

7. *Thornhill v. Alabama*, 310 U. S. 88 (1940). *A. F. of L. v. Swing*, 312 U. S. 321 (1941). *Cafeteria Employees Local 302 v. Angelos*, 320 U. S. 293 (1943).

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union men to discriminate against corporations."⁸ Now the reverse is more nearly true.

It is this radical change in our law and institutions through judicial action that is our concern, although in some of its phases the later decisions reflect a sounder social attitude than do the earlier ones. What goes one way today, may go another way tomorrow.

Anti-Trust Laws and the Unions

Judicial treatment of labor under the Sherman Anti-trust Law presents a similar picture. In 1908 the Supreme Court, speaking unanimously through the Chief Justice in the *Danbury Hatters* case, decided that this law was designed to protect "the liberty of the trader" and that it applied to everybody including labor unions.⁹

The Clayton Act, including labor's Bill of Rights, was passed in 1914 as an amendment to the Sherman Anti-trust Law, and the Supreme Court held that this Bill of Rights did not substantially change the status of union activities.¹⁰ The Norris-LaGuardia Anti-injunction Law was passed in 1932 to regulate the issuance of injunctions in labor disputes, and Mr. Felix Frankfurter, before becoming a Justice of the Supreme Court, declared that the Act dealt with the injunction remedy and did not modify what was lawful or unlawful. He wrote: "Hitherto unlawful conduct remains unlawful."¹¹

In 1911, Mr. Justice Frankfurter, speaking for a divided Supreme Court, finds that the anti-injunction law of 1932 throws light on what Congress intended by the Clayton Act in 1914 and that, therefore, the effect of the anti-injunction law of 1932 is to legalize activities of unions which theretofore were held to be illegal.¹²

As the Court did what many Congresses had repeatedly refused to do for eighteen years—from 1914 to 1932. It legislated new privileges for unions. It is just such legal adroitness—and in labor issues—which the man on the street cannot understand and which used to be the butt of attack by those who called themselves liberals.¹³ Mr. Gompers' "judicial legislation" was becoming useful and popular with those who had condemned it. In a dissenting opinion in the same case¹² Mr. Justice Roberts, supported by the Chief Justice, described this procedure:

"I venture to say," runs the opinion, "that no court has ever undertaken so radically to legislate where Congress has refused so to do. . . . In the light of this history, to attribute to Congress an intent to repeal legislation which has had a definite and well-understood scope and effect for decades past . . . seems to me a usurpation by the courts of the function of the Congress, not only novel but fraught, as

well, with the most serious dangers to our constitutional system of powers."

Judicial treatment of labor's rights under the anti-trust laws thus shows a tendency to give effect to the social viewpoints of the judges rather than to the letter of the law. If a union combines with a "non-labor" group—a non-privileged group—it loses rights, which it would otherwise have, to restrain or monopolize trade. If it operates alone it may travel far without feeling the restraint of law.¹² Formerly it was held unconstitutional as class legislation to exempt union combinations from the anti-trust laws.¹⁴ Now the law is strained to reach the opposite result. Even combinations to prevent the use of improved machinery¹⁵ and recorded music¹⁶ are sanctioned if the obstruction arises from union activity but otherwise if it arises from a trade combination of others.

In 1940 the Supreme Court held that violence and taking violent possession of a hosiery mill and stopping the shipment of finished goods in interstate commerce was not a violation of the anti-trust law¹⁷ but the Chief Justice and others concurring with him thought this to be a reversal of earlier opinions.

Enough as to the anti-trust laws and the unions.

A Complete Reversal of the Law

It is a fundamental rule of law, declared by Justice Holmes, that no conduct, however "innocent and constitutionally protected,"¹⁸ may be used to accomplish an unlawful purpose. That is a profound, practical and fundamental rule of law but apparently the Court has reached the conclusion that it no longer applies to strikes, picketing and boycotting by unions. "So long as a union acts in its self-interest and does not combine with non-labor groups . . . the rightness or wrongness" of the purpose is immaterial.¹⁹ The Supreme Court thus imputed to Congress—erroneously, I believe—an intention to legalize certain militant activities carried on by unions for the purpose of compelling an employer to do things for which he might be fined or imprisoned, as, for illustration, strikes to compel a steamship company or a railroad to refuse to serve non-union merchandise or non-union men. This places these union activities in a preferred status over all other human rights. An ordinary citizen who abets a crime is an accomplice but one who by strike compels a crime seems to be free of taint. The net result is a complete reversal of the law laid down in the unanimous decision of Justice Brandeis, declaring that "a strike may be illegal

8. *American Federationist*, March, 1908, page 163.

9. *Lawlor v. Loewe*, 208 U. S. 274 (1908).

10. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184 (1921). *Duplex v. Deering*, 254 U. S. 443 (1921).

11. Frankfurter-Greene, *The Labor Injunction*, p. 215.

12. *U. S. v. Hutcheson*, 312 U. S. 219 (1941).

13. "For a corrupt judge offendeth not so greatly as a facile."—Francis Bacon.

14. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1902).

15. *U. S. v. International Hod Carriers*, 313 U. S. 539 (1941), aff'g 37 Fed. Supp. 191.

16. *U. S. v. Amer. Fed. of Musicians*, 318 U. S. 741, aff'g 47 Fed. Supp. 304.

17. *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940).

18. *Aikens v. Wisconsin*, 195 U. S. 194 (1904).

19. *U. S. v. Hutcheson*, 312 U. S. 219 (1941).

U. S. v. Building and Construction Council, 313 U. S. 539 (1941). *Fur Workers v. Fur Workers*, 308 U. S. 522 (1939), aff'g 105 Fed. (2d) 1.

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because of its purpose, however orderly the manner in which it is conducted."²⁰

Regulation of Hours and Wages

Not so many years ago the Supreme Court held that Congress had no power to regulate hours and wages in manufacturing and could not even forbid the transportation in interstate commerce of merchandise manufactured under substandard labor conditions.²¹ The regulation of wages and hours in manufacturing was a matter exclusively within the jurisdiction of the state. Recently the Court has held that Congress has the power even to regulate the wages of elevator operators, porters and cleaning women employed by a real estate owner because space in his building is leased to various tenant manufacturers who produce goods for interstate commerce and enjoy the building service.²² According to some recent court rulings those employers who relied on former decisions are liable for a penalty of double overtime pay of time and a half for five years back, and possibly no union, attorney or individual employee has the power to waive any part of such pay by way of settlement.²³ These penalties thus imposed on innocent employers who had acted in entire agreement with the union on what was supposed to be the law mount to hundreds of millions of dollars. The payments thus exacted are in direct conflict with collective bargaining agreements where, over a period of years, everybody assumed that the employees had currently been paid in full—an unconscionable result.

Formerly, according to decisions which President Theodore Roosevelt called "judicial nullification," it was held to be a part of the constitutional liberty of the worker in ordinary industry to work for as long hours and at as low wages as he might accept.²⁴ We now have a federal act fixing minimum wages and maximum hours for employees.²⁵

In 1928 the Supreme Court held that employment exchanges had a constitutional right to fix the fees which they charge, which right could not be taken from them by legislative enactment.²⁶ In 1941 the Supreme Court held that the former decision "is no longer the law" and even upheld a law which prescribed a fixed fee in securing employment for professional workers—a ruling which, in its practical effect, prevents the sale of special services at a higher price to secure employment for this higher grade of employees.²⁷

In 1842 the Supreme Court of the United States, speaking through Mr. Justice Story, held that the

District Courts of the United States were free to exercise independent judgment as to matters of general law and were not in this respect bound to adopt the doctrines of the highest court of the state in the area in which the district court was sitting.²⁸ This remained the law—although vigorously criticized from time to time—for nearly 100 years when it was overruled by the Supreme Court in 1939, without the intervention of the Legislature.²⁹ Regardless of whether the Court was right in the first half of the 19th century or the first half of the 20th century, the significant fact is that this fundamental question of law was changed by the Court after nearly a century of legislative and public sanction. The dissenting opinion, commenting on the impropriety of such an unwarranted change in the law, said:

Evidently Congress has intended throughout the years that the rule of decision as construed should continue to govern . . .³⁰

The psychological background of this shift of position by the Supreme Court is interesting as indicating a possible explanation. The earlier opinion was rendered at a time when there was every effort to make the United States District Courts independent of local influences so as to prevent a perversion of justice through the pressure of local influences, while the more recent decision was rendered at a time when more radical thought, as reflected in legislative proposals and philosophic discussion, urged the desirability of subjecting the federal courts to popular pressure. While at one time in our history the independence of federal courts was thought to create a barrier against the sinister influence of private power, the present trend in many ways seeks to compel the federal courts to respond to prevailing public opinion. Threats of impeachment are frequent when unpopular decisions are rendered.

Concern over Inconsistencies in Adjudications

More recently the Supreme Court seems to have streamlined its process of changing laws through the reversal of previous decisions. In the flag-saluting case, the Court reversed its decision made only three years earlier.³¹ The trend has come to such a pass that the Justices have been chiding each other. Perhaps Mr. Justice Douglas would now revise his remarks, in referring to another case, which he said "dies a slow death." Mr. Justice Frankfurter was chided by Mr. Justice Black, who, in a dissenting opinion, said:

And for judges to rest their interpretation of statutes on nothing but their own conceptions of "morals" and "ethics" is, to say the least, dangerous business.³²

Mr. Justice Roberts, in another case, says:

20. *Dorchy v. Kansas*, 272 U. S. 306 (1926).

21. *Hammer v. Dagenhart*, 247 U. S. 251 (1918). Rev'd by U. S. v. *Darby*, 312 U. S. 100 (1941).

22. *Kirschbaum v. Walling*, 316 U. S. 517 (1942).

23. *Rigopoulos v. Kervan*, 140 Fed. (2d) 506 (1943).

24. *Lochner v. New York*, 198 U. S. 45 (1905).

25. *Wilson v. New*, 243 U. S. 332 (1917).

26. *Adkins v. Childrens Hospital*, 261 U. S. 525 (1923).

27. Fair Labor Standards Act of 1938.

28. *Ribnik v. McBride*, 277 U. S. 350 (1928).

29. *Olsen v. Nebraska*, 313 U. S. 236 (1941).

30. *Swift v. Tyson*, 16 Pet. 1 (1842).

31. *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938).

32. Same, at p. 86.

31. *West Va. State Board of Education v. Barnette*, 319 U. S. 624 (1943).

32. *Mercooid Corp. v. Mid-Continent Investment*, 320 U. S. 661 at 673 (1944).

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The evil resulting from overruling earlier considered decisions must be evident. . . . The law becomes not a chart to govern conduct but a game of chance. . . . the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in current controversy.³³

A later opinion by this same Justice, protesting a reversal of a decision only nine years old, expressed the idea more popularly:

The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only.

It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this Court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion. . . .³⁴

Now we come to the fire insurance decision of June 5, 1944. From 1869 to 1944—a period of seventy-five years,—according to repeated decisions of the Supreme Court—the business of fire insurance was not interstate commerce. On June 5, 1944, by order of four Justices of that Court, it becomes interstate commerce. During that period of seventy-five years Congress enacted the Sherman Anti-Trust Law, without intending its application to fire insurance; states passed regulatory laws, many of them recognizing the fixation of insurance rates by agreement subject to state approval. Under the recent holding of the four Justices, indicted insurance men apparently may be fined and jailed for acts which were innocent and proper at the time they were done. It is equivalent to passing an ex-post-facto law in 1944 that men may be punished for what they did in 1943—a shocking result. As pointed out by Chief Justice Stone in his dissenting opinion, a state of utter chaos is created by this sudden demolition of the established foundations upon which this industry and the various state governments and Congress have relied for many decades.

It is no coincidence that the present Court should, in effect, legislate to extend the anti-trust laws to insurance and to exempt unions therefrom, just as in other respects it has curtailed rights of business and expanded rights of unions.

Nor have we attempted to state all of the recent instances of reversal of law by the Supreme Court.

Before the New Deal era the Supreme Court was attacked by self-designated liberals as guilty of "judicial legislation"—usurping the functions of the legislature

by making decisions which were equivalent to the enactment of new laws. Now liberals and New Dealers glorify that practice. The results of judicial legislation since the early 30's are truly revolutionary. Statutes and the Constitution have both been amended without recourse to the only political process which is presumed to make such amendments. Changes which Congress refused to make have been made by the Court as if it were the Legislature. Established construction of constitutional powers has been overturned with no referendum to the people or their representatives who are alone supposed to be vested with such authority. A hundred years of existence of the Supreme Court prior to the 30's gave few instances of what was recognized as a judicial reversal by the Court and the most important instance was a source of bitter recriminations.³⁵ The frequency of these changes in the last ten years has made us callous to the significance of this trend. We hardly realize how far we have travelled. The stability of our Constitution and laws as we used to measure it is greatly lessened. Except for special war legislation the Court has done more, far more, to change our institutions in the last ten years than has Congress itself.

To what extent the old Court or new Court was right or wrong, I express no opinion. That is not material to this discussion. The question is, who shall make our laws or amend the Constitution—Justices of the Supreme Court, chosen for life to be beyond the tendencies of the weather vane, or Congressmen and Senators, who are supposed to reflect the changing demands of the people, or the people themselves, as the case may be?

Many are familiar with the alarm sounded by Thomas Jefferson over possible judicial usurpation:

It has long been my opinion that the germ of dissolution of our federal government is in the constitution of the federal judiciary, an irresponsible body, working, like gravity, by day and by night, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped.

This process of judicial legislation is somewhat explained—mitigated or aggravated, depending on your viewpoint—by the tidal wave of social change which has also been carrying legislatures and executives beyond their moorings. A few illustrations of this—though digressions from my title—will help to interpret the influences under which the judges have acted.

First, as to the Executive branch of our government. In 1894 President Cleveland, in dealing with the Pullman riots in Chicago, said: "If it takes the entire army of the United States to deliver a postal card in Chicago that card will be delivered." A few years ago the Wheel-

33. *Mahnich v. Southern S. S. Co.*, 64 S. Ct. 455 (1944).

34. *Lonnie E. Smith v. S. E. Allwright*, U. S., No. 51, April 3, 1944.

Anderson v. Abbott, U. S., March 6, 1944, dissenting opinion—"We are dealing with a variety of liability without fault. The

Court is professing to impose it, not as a matter of judge-made law but as a matter of legislative policy and it cannot cite so much as a statutory hint of such a policy."

35. *Knox v. Lee*, 79 U. S. 457 (1871).

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ing Steel Company had to protect the safety of its willing employees from strikers by keeping them in the mill and sending them food by parcel post. The Postal Department of the United States refused to order its employees to pass the picket line. On other occasions federal officials have sought and received permits from pickets to perform their official duties. During the automobile sit-down strikes, both Governor Murphy and President Roosevelt thought it unwise to invoke the sovereign power of government when court orders and the fundamental right to work were trampled under foot. Shortly thereafter Governor Murphy was made Attorney General of the United States—the chief law-enforcement officer—and then a Justice of the Supreme Court. With such a dramatic illustration, multiplied by less dramatic instances of a collapse in law enforcement in labor disputes, it would be a rash man who would assure his children that the time will come in their lives when it will generally be safe for a man to cross the picket line—when in practice scabbing will be treated as a right.

Norris-LaGuardia Act of 1932

Another glance at the Norris-LaGuardia Act of 1932 will show the extent to which this tidal wave carried the Legislature beyond the bounds of balanced reason.

Formerly the Court issued injunctions against the oppressive and anti-social use of economic power on the part of labor unions—like combinations to deprive the public of modern inventions and efficient production—just as it issued such injunctions against the unfair use of economic power on the part of employers.³⁶ Anti-injunction laws as applied to labor disputes had been held to be unconstitutional.³⁷ Today such a procedure has been largely ended. The Norris-LaGuardia Anti-injunction Law in effect forbids issuance of injunctions in labor disputes except to restrain fraud and violence. But this law goes further; it places unmoral restrictions on the issuance of even such injunctions. An employer cannot obtain an injunction even against violence unless it appears that he has made every effort "to settle such dispute by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration," and the Supreme Court has recently denied an injunction against violence because the employer refused arbitration.³⁸ The principle of imposing disadvantages on those who refuse to arbitrate is a sound one but society is not interested alone in encouraging employers to accept the peaceful process. It has a like interest in the conduct of unions. Under the Norris-LaGuardia Act the union can engage in violence without even notice or attempted negotiation, but the employer cannot seek relief by way of injunction, even against violence, without first compounding the crime by seeking terms of settlement. This is wrong.

Ill-considered action by the aggressor should be discouraged as much as a stupid defense by the aggrieved.

Equally biased is the requirement that no injunction against violence shall be issued unless it appears that "greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon the defendants by the granting of relief." Think what that means. If the perpetrators of violence will suffer too much injury by stopping the violence, the injunction is not to be granted. By the terms of this statute the damage caused the employer by the violence is to be balanced against the damage caused the union by the stoppage of violence. It is like saying that it is not theft to steal bread if the thief is hungrier than the owner. It is the doctrine of Pennsylvania in dealing with bootleg coal—because miners and others need jobs or money, some ten or twenty thousand of them have been allowed openly to steal coal and sell the plunder, and thus demoralize the coal business. The necessities of the criminal control.

Unbalanced also is the National Labor Relations Act, which requires an employer to deal with a labor union chosen by its employees, regardless of union standards of conduct, and which imposes no minimum social standards on the union as a condition of enjoying the benefits of the Act. Special legislative protection may well be extended to a union which acts in accordance with sound social needs and standards, but the same protection should not be extended to anti-social organizations. Any statute which requires the employer to deal with a union should impose reasonable requirements on the union, both for the protection of the employer and society.

The federal anti-racketeering law forbids an attempt to obtain payment of money by violence, but there is special dispensation in respect to the use of violence to force the payment of money as wages. So when union men laid in wait for trucks crossing from New Jersey to New York and beat up the drivers unless they would step down and let the assailants run the trucks for a charge of \$9.42, or pay the \$9.42 for protection without stepping down, the Court held this did not constitute a violation of the law.³⁹ "Holdups" for jobs, or wages in lieu thereof, were therefore given a preferred position as compared with other "holdups."

Whether we look to anti-injunction laws or anti-trust laws or anti-racketeering laws, or whether we observe the inaction of the state in times of strikes, or whether we turn to the changed attitude of the Supreme Court, it becomes apparent that our public policy is to deal indulgently with labor for acts of violence and that this public policy has received encouragement at the hands of the Legislature, the Judiciary and the Executive.

The union movement has been the foremost beneficia-

36. *Bedford Cut Stone Co. v. Journeymen*, 274 U. S. 37 (1927).
Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921).
 37. *Truax v. Corrigan*, 257 U. S. 312 (1921).

38. *Brotherhood of R. R. Trainmen v. Toledo, Peoria & W. R. R. Co.*, — U. S. —, Jan. 15, 1944.
 39. *U. S. v. Local 807*, 315 U. S. 521 (1942).

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ry of this revolutionary change in governmental attitude. From an institution which was certainly not encouraged by law, it has become the recipient of special privileges from the courts, the Legislature and the Executive branch of our government. The next problem is to utilize unions to the uttermost for the promotion of sound democratic institutions. Whether their present power came largely through the coercive influences of violence, or the closed shop or other illegitimate parentage is immaterial—except in so far as it may have caused demoralization—the hope of the future lies not in cutting back that power, but harnessing it for the public good.

The over-eager reformer will have little sympathy with this discussion. If the results are desirable, he will say, why quibble over the means—a little violence and a little usurpation of power, here and there, now and then, are of little consequence. I wonder. If law and order are desirable; if our governmental structure of three coordinate branches is worth while, their functioning should not be permanently impaired in the cause of accelerated progress. That is placing temporary expediency above fundamental principles. Benito Mussolini, by overthrowing democracy, temporarily brought material benefits to the Italian nation—but at what price?

Rationing

IN the world-wide conflict for the preservation of our freedom and our chosen form of government, good citizens yield priority to our fighting men on land and sea and in the sky, for everything they may need to hasten the day of victory.

We have become accustomed to the radio call, "gasoline powers the attack—don't waste a drop."

Perhaps it is not so generally realized that great quantities of paper are of critical importance as a necessity of modern warfare. Because of this fact, paper has been rationed and the burden of the limitation of print paper falls heavily upon publishers.

Here is a brief and simple statement of how paper rationing affects the JOURNAL.

Our paper consumption in 1944 must be at least ten per cent less than in 1943. This means that we must not use more than a monthly average of sixty-eight pages. The September and October numbers may have to go to seventy-two pages because of the need for space essential to the annual meeting. The other four months' issues must be reduced to sixty-four pages or less. If we use up all our paper allowance before the December number is printed there can be no December number.

It goes without saying that we highly appreciate the generous spirit of our contributors who give so unstintingly of their time and effort. We regret that we have never been able to use all the valuable material tendered. Please understand that we shall have to return a greater number of manuscripts hereafter and that preference must be given to those who have learned to eliminate the unnecessary use of words, and still more important, those who have learned to express a thought once and to avoid stating it again.

Much as we regret the necessary restriction of the JOURNAL's format, there is some compensation, if it helps to demonstrate that brevity is one of the necessary ingredients of readability.

Because the war necessitates the rationing of our paper will you not ration the use of your words?

RATIONING SUSPENSION ORDERS: A REPLY TO DEAN POUND

By RICHARD H. FIELD, JR.

General Counsel, Office of Price Administration

A LEGAL scholar may through years of painstaking research and objective criticism establish such prestige that his pronouncements on any subject will be accepted by most readers as being based upon careful consideration of the facts. Dean Pound's comments on the administrative process in the March issue of the AMERICAN BAR ASSOCIATION JOURNAL have doubtless been persuasive to the Bar. In deploring what he terms group "administrative absolutism," Dean Pound discusses almost exclusively the Office of Administrative Hearings of the Office of Price Administration. His charges are serious ones. If warranted, they demand corrective action. If unwarranted, each day that they go unchallenged makes more difficult the effective functioning of vital war-time controls.

In treating this subject, Dean Pound has apparently accepted, in its entirety, a report on the matter made by a committee of the San Francisco Bar Association.¹ It seems proper to request a suspension of judgment as to the validity of Dean Pound's conclusions until the underlying facts are examined. The purpose of this paper is not to meet undocumented assertion with counter-assertion, but to furnish the reader with the basis for forming an intelligent judgment of his own. At the outset the legal foundation for the rationing and suspension power should be considered.

The Priorities and Allocations Act of 1941 and the Second War Powers Act of 1942 conferred on the President the power to allocate scarce materials "in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." The Congress also authorized the President to exercise this power through such agency or officer as he might direct. The President originally conferred his allocation function on OPM but this power was later divided, with his specific approval, among various agencies of the Government, including OPA. OPA's allocation at the retail and consumer level is popularly termed rationing. Dean Pound, unlike every court which has passed on the issue² can find no statutory basis for rationing regulations. He cites the San Francisco Bar Association Committee's statement that no such support can be

found in the Presidential priority power. Any reference to the allocation power is at this point in his discussion avoided. And Section 201(b) of the Emergency Price Control Act, authorizing the President "to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing," is not mentioned. After further consideration in a Supplemental Report printed in the same brochure, the Committee concedes OPA has valid rationing authority, citing a few of the court cases so holding.

Rationing is necessary because of shrinking supplies of critical materials, such as rubber and gasoline, and unprecedented military and civilian demand. The inevitable consequence of eliminating rationing would be hoarding, manipulation, speculation, predatory competition, and a lowering of living standards. A certain consequence would also be skyrocketing prices.

Since the available supply is limited, every allocation to meet one demand entails a withholding of shortage materials desired by someone else. A choice must be made among competing civilian claims, a choice made with reference to the standard of wartime public interest and directed toward securing equitable distribution in accordance with demonstrated need.

A fair rationing plan must necessarily operate so as to prevent diversion and waste of critical commodities. Although as an initial matter all persons may be permitted to deal in rationed goods, on the assumption that they will not divert the supply, in the event that a distributor proves untrustworthy, OPA would be derelict in its duty if it did not allocate away from the violating distributor. The withdrawal of the allocation is itself an allocation away from an irresponsible dealer to others who are more likely to handle the rationed commodity properly. This withdrawal of an allocation for violation of the ration system is accomplished by a suspension order. The withdrawal or suspension of the allocation of gasoline, for example, from dealers who, negligently or intentionally, are disrupting the rationing program and causing diversion of that vital product is the only fair thing to do to protect the interest of other dealers who are living inside the rationing rules, and to safeguard law-abiding consumers who are en-

1. Dean Pound does not refer to the Report of the San Francisco Chapter of the National Lawyers Guild which completely vindicates the OPA practice.

2. *U. S. v. Randall*, 140 F. (2d) 70 (CCA 2d, 1944); *Henderson*

v. Smith-Douglas Co., 44 F. Supp. 681 (E.D. Va., 1942); *Henderson v. Bryan*, 46 F. Supp. 682 (S.D. Colo., 1942); *U. S. v. Wright*, 48 F. Supp. 687 (D. Del., 1943); *Brown v. Bernstein*, 49 F. Supp. 728 (M.D. Pa., 1943); *U. S. v. Beit Bros.*, 50 F. Supp. 590 (D. Conn., 1943).

RATIONING SUSPENSION ORDERS

titled to an equitable share in the available civilian supply. The share of legitimate dealers and users would be materially increased if illegal transfers of gasoline could be eliminated. It is essential therefore to prevent untrustworthy distributors from dealing in the commodity. A short suspension may enable one dealer, who merely has been careless, to set his business in order for living under the rationing system, whereas another distributor may have so demonstrated his total inability or unwillingness to follow essential rationing rules as to require suspension for the duration. Consumers too are allotted gasoline on certain conditions, for example, that it be used for traveling to and from a defense plant in a location which has limited public transportation facilities. If the gasoline is employed for traveling to Florida, it is only fair that the gasoline allotment be withdrawn or suspended.

The order entered is not "wholly in the discretion of the Hearing Commissioner." The yardstick Dean Pound has been unable to discover is nevertheless available. In the first place, no suspension may exceed the period of rationing of the commodity involved. This is an absolute limit. When coffee was withdrawn from the ration list, all suspensions with respect to it were automatically lifted. Furthermore, the statute requires every allocation, affirmative or negative, to be in the public interest and promote the national defense. The judgment of the individual Hearing Commissioner as to the length of suspension cannot be equated to "caprice." Dean Pound should not lightly assume that OPA Hearing Commissioners and the Hearing Administrator act in an arbitrary and capricious fashion. Their judgment is in any event subject to judicial review and a capricious judgment as to the period of suspension would be overturned.

We have seen that the suspension order is a necessary part of the allocation process. Its exercise cannot be said to be "at variance with the statutes or the general law governing the action of the administrative agency." It is in keeping with the policy of the Second War Powers Act. That Act makes the courts available for punishing violators of rationing regulations. But suspension orders are not issued as punishment for transgression. The Hearing Commissioner upon occasion, when particularly pressed, appoints a presiding officer to hear evidence and make recommendations. Where the presiding officer, a lawyer designated from the practicing Bar of the community, conducts a proceeding on the theory that he is determining whether to punish a violator, the Hearing Commissioner will order that a new hearing be held. The Hearing Administrator likewise exercises this supervisory power on appeal over the Hearing Commissioners in the field.³ There is no encroachment on the function of the judiciary to inflict punishment.

The suspension order is employed as part of the allocation function by the War Production Board, the War Food Administration, and the Petroleum Administration for War, as well as by the Office of Price Administration. The OPA has been upheld, as acting within the statutory allocation power, by both the Circuit Court of Appeals for the Fifth Circuit in *Brown v. Wilemon*,⁴ reversing one of the cases relied on by Dean Pound, and by the Court of Appeals for the District of Columbia in two cases, *L. P. Steuart & Bro. v. Bowles*,⁵ and *Country Garden Markets v. Bowles*.⁶ These are the only appellate court determinations. OPA has likewise been sustained by twelve of the 14 United States District Court judges who have passed on the validity of OPA suspension orders. If Dean Pound nevertheless thinks OPA has been acting in "contravention of the statutes" he cannot blame it on administrative absolutism. OPA has welcomed every one of these tests, delegating to its representatives in the field authority to accept service for the Administrator in suits brought to enjoin suspension order enforcement. In the *Steuart* case, twice fully argued and briefed in the district court and the Court of Appeals, and twice decided in favor of the Administrator's position that the allocation power includes the power to suspend for violations, certiorari was sought by the company in the Supreme Court of the United States. The government did not contrive to achieve "exemption from such review," but rather offered no opposition to the petition. Administrative absolutism is so far from being absolute in fact that the further exercise of the suspension power is completely dependent on the ultimate disposition of this case, now that certiorari has been granted.

In the use of the suspension power great care has been taken by OPA to safeguard the individual from any injustice in the withdrawal of his allocation as a dealer or user. These administrative safeguards will be described. It should be remembered, however, that the decision of OPA to suspend is not final. It is subject to collateral judicial review by the courts. Such review can be obtained by bringing a suit to enjoin enforcement of the suspension order. The court will examine the administrative record to determine whether there was substantial evidence to support the suspension. The records of many other administrative agencies, state and federal, are examined.

There is no right, vested or otherwise, in wartime to misuse and divert critical shortage commodities. The OPA makes no assumption that "the individual existence is a concession from the government." It is true every ration order bars the citizen from access to vital articles. The suspension-allocation order bars access to critical commodities to dealers who will divert the goods in such a fashion that some consumers will

3. *Matter of Thomas I. Lingo, d/b/a Dollar Markets*, Docket No. 8-119A, decided Nov. 1, 1943.

4. 139 F. (2d) 730 (CCA 5th, 1944).

5. Decided Feb. 18, 1944, not yet reported.

6. Decided March 6, 1944, not yet reported.

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not be able to get the share to which they have every right, that is, they will not be able to get it unless they are willing and able to traffic in the black market. The consumer himself is under a patriotic obligation to use these scarce goods for the necessary purposes which entitled him to perhaps a greater share than his neighbors.

Withdrawals are not contemplated where the rationed commodity is indispensable to a person's welfare. Such a withdrawal would not be in the public interest.

Suspension Order Procedure

When OPA hearing commissioners enter rationing suspension orders they are not exercising the judicial power of the United States. Instead they are exercising the allocation power which has been vested by Congress in the Administrator. But such power is exercised in this way only when a person is shown to have violated the general rules laid down in the ration orders for the handling of rationed goods. And when OPA is faced with the problem of deciding whether a person has committed acts which amount to a violation of these general rules, it is faced with very much the same kind of problem which courts are called on to solve. The Administrator has therefore set up an entirely separate staff of men, which is independent of the operating and enforcement departments of the agency, to make these decisions for him. And he has promulgated rules of procedure which embody for these administrative hearings the essential safeguards of fair play along lines which have been worked out by the courts, and recommended by the Attorney General's Committee on Administrative Procedure in January, 1941.⁷

Criticism of this procedural system has taken two sharply divergent lines. Some have sought to condemn it because it is too much like a court.⁸ Others, including Dean Pound, find fault with it because it fails to reproduce more completely what courts do. It is with the latter criticism that we have here to deal. It may not be amiss to point out that while various aspects of suspension orders have been challenged in the federal courts twenty times, in only *one* case was an attack made on the fairness of the procedure and that

attack did not prevail.⁹ Moreover one of the only two judges to hold that OPA lacked the authority to issue suspension orders stated that:

If there was authority for the procedural order it sufficiently guaranteed the safety and rights of the plaintiffs.¹⁰ (Emphasis supplied)

The procedure for these hearings was, at the time Dean Pound and the San Francisco Bar Association had the matter under consideration, contained in Procedural Regulation No. 4.¹¹ Since then there has been a revision of this regulation which became effective April 1, 1944.¹² These rules are of course basic. Equally important is the way they have been interpreted in practice, and this can be determined from the actual decisions of hearing commissioners and the Hearing Administrator, which are in writing. What follows is drawn from these and other sources. We believe it shows that in exercising this phase of its allocation power, OPA affords to citizens who are charged with rationing violations not only the full measure of their constitutional rights but every consideration of fair play.

Personnel of the Office of Administrative Hearings

All of the hearing commissioners, chief hearing commissioners, and those on the Hearing Administrator's reviewing staff, as well as the Hearing Administrator himself, are lawyers. Many of them have had judicial experience.¹³ They represent one of the most highly paid groups in the agency, and have been selected for their ability, maturity, and experience. The members of his staff are appointed by the Hearing Administrator, who is entirely independent of the other departments of the organization. He is responsible only to the Administrator, part of whose allocation function he performs.¹⁴ Thus there is observed within the agency that complete separation of function between those who investigate or prosecute and those who judge, which was recommended by the Attorney General's Committee.¹⁵

The notice of hearing corresponds to the summons and complaint in a civil action. It must set forth the time and place of hearing and must be served at least seven days before such hearing.¹⁶ There is a provision

7. Final Report of the Attorney General's Committee on Administrative Procedure. United States Government Printing Office, D. C. (1941).

8. See, for example, Second Intermediate Report of the Select Committee to Investigate Executive Agencies, 78th Cong., 1st Sess., House Report No. 862. This charges that "the Office of Price Administration has established its own judiciary along with prosecuting attorneys and a constabulary." p. 14.

9. In *Country Garden Market v. Bowles*, plaintiff alleged that the notice of hearing was insufficient and that hearing commissioners were prejudiced. The case was decided in favor of the Administrator on all points, and this ruling was unanimously affirmed by the Court of Appeals.

10. *Atwell, J., in Wilemon v. Brown*, 51 F. Supp. 978 (N.D. Tex., 1943).

11. 8 F. R. 1744, issued Feb. 6, 1943, effective March 1, 1943.

12. 9 F. R. 2558, issued March 6, 1944, effective April 1, 1944.

13. Dean Pound states, p. 122, that there is no requirement that hearing commissioners be lawyers. This is not the fact. The qualifications for these officers established by OPA and ap-

proved by the Civil Service Commission require that appointees (1) be members of the Bar, preferably of a state located within the region in which they will serve, and attorneys of maturity who have been active in legal affairs, commanding the respect of their community; (2) have at least three years' experience in the trial and argument of cases or as a judge or as a hearing officer; and (3) have an academic background and experience sufficient to enable them to understand commodity control at all levels of production and distribution.

14. Administrative Order 75, issued Feb. 8, 1943, revised Dec. 14, 1943; General Order 46 issued Feb. 6, 1943, effective March 1, 1943, 8 F. R. 1771.

15. *Op. Cit., supra*, note 1, at 56.

16. R.P.R. 4, §§2.1, 2.2. Under the former instruction notice of hearing had to be served 3 days before the hearing. P. R. 4 §1300.152. In view of the serious consequences which might ensue from continuing diversion of essential war-scarce commodities, the shorter period seems justified. Extensions of time were liberally allowed in practice and from the thousands of proceedings held under the old regulation there was only one in which the

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for the continuance or adjournment of the hearing to a later date or to a different place.¹⁷ Dean Pound finds objectionable the absence of any requirement that the hearing be held in the vicinity where respondent resides or conducts his business. The absence of such a requirement is the rule among administrative agencies. The practice of the hearing commissioners is, however, to hold hearings as near as practicable to the place where respondent resides or has his business.¹⁸

The regulation requires "a clear statement of the charges against the respondent with a reference to the particular section of the regulation or order alleged to have been violated, and a statement of the purpose or purposes for which the hearing is to be held." This, if anything, requires greater detail than do the Federal Rules of Civil Procedure for complaints in civil actions.¹⁹ Furthermore, the Hearing Administrator has interpreted the regulation strictly, as requiring a more detailed statement than that generally held adequate in civil actions.²⁰ Except in one situation, treated below, no pleading is required of the respondent.

The regulation, like any code of court procedure, provides for a default if the respondent fails to appear. In such case the usual consequences of a default ensue. The charges may be taken as true but the OPA enforcement attorney must present "evidence relevant to determination of the effective period of any suspension order."²¹ And there is a provision for the reopening of such a default if cause is shown within ten days.²² There is also a provision that if notice of hearing is given at least ten days before the time set for hearing and if the notice states that a hearing will be held only on request and upon a statement of the general nature of the defense to the charges then the hearing will be held only if this provision in the notice is complied with. Dean Pound asserts (p. 123) that this procedure "assumes that the case against the respondent is established by one-sided investigation made in advance of the hearing. . . ." The provision in question requires virtually²³ no more of a respondent than is required of every defendant in a civil case, viz., that he file an answering pleading if he expects to contest the case. This serves

to indicate whether there is to be a controversy and set the limits for it. The challenged provision has precisely the same function. It is noteworthy only because it points up the general rule under OPA procedure which allows a respondent to raise any relevant issues without any advance notice whatever.

Respondent's Right to Compel Attendance of Witnesses

Both parties to a suspension order proceeding may obtain subpoenas to compel the attendance of witnesses. Revised Procedural Regulation 4, in common with general administrative practice, has sought to prevent abuse of the subpoena power available for administrative hearings by requiring the party seeking a subpoena to apply for it and make some showing of why he needs it.²⁴ This is only fair to the prospective witnesses who may be wanted simply for the purpose of producing unneeded cumulative or other evidence, or simply for harassment. In practice, subpoenas have never been withheld where needed. There consequently should be no anxiety because of the protective device of permitting the Hearing Commissioner to pass upon such applications. It is customary both in our civil courts and in administrative proceedings for the party calling a witness to pay the fees involved. Any other practice might lead to serious abuses. The OPA practice of holding hearings in respondent's vicinity minimizes the expenses entailed. Surely the contention that the OPA has "unlimited funds" cannot be a serious one.

Conduct of Hearing

By far the most serious charge made by Dean Pound concerns what he justly calls a "first principle of judicial justice, namely, . . . hear the other side." As applied to OPA suspension order procedure, however, any charge that this principle has been violated is wholly unfounded. Not only has the respondent a right to be heard and present his defense, he has a right to be represented by counsel of his own choosing, and to cross-examine the witnesses who testify against him just as he would in court.²⁵ The burden of proof on all

respondent (i.e. person against whom the proceedings were instituted) complained, on appeal to the Hearing Administrator, that he was not given adequate time to prepare his defense. In this one case the matter was reversed to allow full time for preparation. *Matter of Shell Oil Co.* (Docket No. 7-182A, Apr. 11, 1944).

Such short periods have often been provided in civil litigation dealing with emergency situations, e.g., in obtaining injunctions, in actions to dispossess tenants, and the like.

In spite of these considerations, the longer period is now required.

17. P.R. 4 §1300.155; R.P.R. 4 §2.6.

18. Here too (cf. note 16, *supra*) there has been a complete absence of any complaint, on appeal to the Hearing Administrator, of arbitrary action in choosing a place for hearing or in refusing to adjourn the hearing to another place, on application.

19. These require, in addition to the statement of jurisdiction: "(2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled." F.R.C.P. Rule 8(a).

20. Thus, in *Matter of Mrs. H. N. Venzer* (Decision on Appeal, Docket No. 234A, Sept. 17, 1943) the Acting Deputy Hearing Administrator held the notice of hearing insufficient and said:

"The notice of hearing herein, however, merely states, 'you are charged with having violated the provisions of Ration Order No. 16, Sections 20.1(b), (k), and (m)'. The notice then sets out the text of these sections of the Ration Order. There is no particularization of the violations charged, no statement of the date, place or circumstances under which the violations were alleged to have occurred, or details as to the nature of the particular violations. . . ."

This decision was made under the former regulation which required "a statement of the charges against the respondent, and a statement of the purpose for which the hearing is to be held." P.R. 4, §1300.153.

21. R.P.R. 4 §2.7(a); P. R. 4 §1300.164.

22. R.P.R. 4 §2.7(b); P. R. 4 §1300.164(b).

23. The only additional requirement is that a respondent in suspension order proceedings must request a hearing. Surely there is no burden here. And as a matter of practice hearing commissioners have been liberal in construing any expression of desire for hearing—even if first made by a personal appearance at the time and place therefor—as sufficient to call for a hearing under this rule.

24. P.R. 4, §§1300.157, 1300.158; R.P.R. 4, §§2.8, 2.9.

25. P.R. 4 §1300.156; R.P.R. 4 §2.3.

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issues is on the Administrator, and the respondent does not have the burden of showing his innocence.²⁶ There is a transcript taken of all the evidence offered at the hearing.²⁷ The hearing commissioners must make findings of fact and conclusions of law²⁸ and his findings are just as much limited to the evidence as a judge's would be to the evidence produced in court. Such commissioner is not permitted to "make determinations on the basis of reports [or of any other evidence] not divulged."²⁹ Nor will he be permitted to decide a case "without a basis in evidence of rational probative force."³⁰ The Office of Administrative Hearings has adhered strictly to the requirements laid down by courts in evaluating the sufficiency of evidence.³¹ As a result there has not been a single case in which, on review, a court has struck down an OPA suspension order for lack of substantial evidence to support it. All of these safeguards have been applied in spirit as well as in form. To this a striking fact bears eloquent testimony. OPA has lost a substantially greater proportion of proceedings before the hearing commissioners than it has civil or criminal cases in the courts.³² These are facts which any conscientious inquiry into the subject would have revealed. Their existence inevitably raises the question whether in passing judgment upon the serious efforts of this wartime agency, the learned Dean himself took care to "hear the other side."

Two less serious attacks made upon the conduct of hearings deserve brief mention. Dean Pound points out that the refusal of a witness to answer any question which has been ruled proper shall, in the hearing officer's discretion, be ground for striking out all testimony previously given by such witness on related matters.³³ Part of the danger seen in this provision was grounded on the mistaken impression that hearing commissioners might not be lawyers. Perhaps the objection is meant to go further. But the rule is not an unreasonable one when it is remembered that the commissioners do not have the power which courts have to punish a contumacious witness for contempt and that this provision serves only to protect a party from the effect of testimony which a witness wrongfully prevents from being tested by proper cross-examination. As a matter of fact I have been able to find no instance where a hearing commissioner has made use of this provision.

Dean Pound also objects to the provision for the use of presiding officers to conduct hearings upon cases which are to be decided by others (viz. hearing commissioners).³⁴ This corresponds closely to the equity practice of references to masters or referees. It is not intended to be the normal mode of hearing, but it

affords a method which serves the convenience of all parties where dockets are crowded or distances are very great. The presiding officer does not decide the case but furnishes a full report to the hearing commissioner and provides respondent with a copy. Respondent may file a brief pointing out what he considers to be error.

Modification

Under Revised Procedural Regulation 4, the respondent in the administrative proceeding may file an application for further hearing or for modification of the suspension at any time when an appeal is not pending. The Hearing Commissioner may modify or vacate an order issued by him to correct errors of fact or law disclosed by the record, or for newly discovered evidence.

Appellate Review

An administrative appeal from the decision of the Hearing Commissioner may be taken by the respondent or the District Enforcement Attorney. This appeal to the Hearing Administrator affords the respondent an opportunity in the administrative process of securing a review of his case. During the pendency of the proceeding on appeal, the order may be, and generally is, stayed. The stay of the order may be entered by either the Hearing Commissioner or the Hearing Administrator on the application of the party. In the event that no stay is granted, the aggrieved party would, practically speaking, have exhausted his administrative remedy to an extent entitling him to judicial review. He may then apply to the district court for a stay pending court hearing. There is no basis in fact for saying that supersedeas in case of a judgment of a district court is more readily obtainable than the administrative stay. Furthermore it is worthy of notice that a supersedeas would be conditioned on a bond making the other party whole, whereas here no bond need be furnished and in fact there is no way of making whole the public interest which may be adversely affected pending review on appeal. The liberality of the administrative practice would hardly seem to justify Dean Pound's attack. It must not be overlooked that any provision for an automatic stay would open up real possibilities for abuse and delay. This possibility must be weighed against the background of the exigencies of the fight against black market in ration goods.

Conclusion

The necessity of wartime rationing is almost universally conceded. The withholding of scarce goods from those who would dissipate them outside the ra-

26. *Matter of Schwartz* (Decision on Appeal, Docket No. 2-1140A, Dec. 17, 1943).

27. P.R. 4 § 1300.160, R.P.R. 4 § 2.11.

28. P.R. 4, § 1300.165 (b); R.P.R. 4, § 3.1 (b).

29. *Matter of Tramor Cafeteria, Inc.*, decided July 27, 1943, Decision on Appeal, Docket No. 4-18A.

30. Cf. Dean Pound, at p. 124.

31. *Matter of Blumberg*, decided Jan. 8, 1944. Decision on Appeal, Docket No. 8-86A; *Matter of Glick Bros.* decided Oct. 29, 1943, Decision on Appeal, Docket No. 2-461A.

32. During 1943 OPA has won 97.8% of the injunction suits brought, 98.1% of the Administrator's treble damage cases, all of the license suspension actions under the Price Control Act, and 94.4% of the criminal prosecutions. In contrast suspension orders have issued in only 87.7% of the proceedings instituted.

It should be noted that these statistics clearly show the care with which all types of cases are screened in the investigation stage.

33. P.R. 4, § 1300.159; R.P.R. 4, § 2.10.

34. P.R. 4, §§ 1300.156, 161, and 162; R.P.R. 4, §§ 1.1, 2.3, 2.12, and 2.13.

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tioning system is an integral part of effective rationing. Those charged with administering these difficult problems welcome any constructive criticism looking toward the betterment of the administrative hearing procedure. It was devised in the light of the best available administrative precedents and with full use of the recom-

Since this article was written several changes have taken place that deserve notice. The Supreme Court has upheld the Administrator's power to issue rationing suspension orders. *L. P. Stewart & Bro. v. Bowles*, No. 793, U.S. Sup. Ct., Oct. T., 1943, decided May 22, 1944.

After this decision Congress expressly confirmed the power. Stabilization Extension Act of 1944, Section 108(e).

There has been one district court decision holding that the

recommendations of the Attorney General's Committee. It has since been improved, and I am sure it is susceptible of still further improvement. I submit, however, that it has been basically fair from the outset and a far cry from the "administrative absolutism" which Dean Pound fears.

suspension order involved was not based on substantial evidence. *Automobile Sales Company, Inc. v. Bowles*, N. D. Ohio, E. D., decided April, 1944.

There have been two changes in Revised Procedural Regulation No. 4. The ten day notice provision (see p. 388, supra) has been dropped and the provision for striking the testimony of a contumacious witness (see p. 389, supra) has also been dropped.

COMMENT ON MR. FIELD'S REPLY FOR THE OPA

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Chairman of the American Bar Association's
Committee on Administrative Law

IN commenting on Mr. Richard Field's reply to Dean Pound's article in the March (1944) issue of the *AMERICAN BAR ASSOCIATION JOURNAL*, I first point out that Mr. Field is essentially replying to the report of the Committee of the San Francisco Bar Association on the creation and functioning of tribunals established within the Office of Price Administration to hear complaints and violations and to issue suspension orders. That Committee was appointed following the request of Everett C. McKeage, former judge of the Superior Court in San Francisco, who was the newly appointed Chief Hearing Commissioner of the OPA for Region VIII, in which San Francisco is situated.

The report of the San Francisco Committee was made after attendance at hearings conducted by a hearing commissioner, a submission of questions to and answers by the regional enforcement attorney of the OPA, and two supplemental reports, the last of which was made on November 23, 1943. These reports were very complete, and indicated that the Office of Administrative Hearings in the OPA had made changes in its procedure to meet some of the criticisms.

Dean Pound's article was addressed to the larger problems of administrative law under constitutional government. In that connection he reported accurately the findings of the Committee of the San Francisco Bar Association.

Mr. Field admits, as the OPA attorneys admitted to the San Francisco Committee, that the OPA does not rely upon any express grant by the Congress of power to issue suspension orders after hearing, but relies solely upon the inferred powers justified by the objectives and the war emergency. As Dean Pound suggested: "Such a wide assumption of administrative lawmaking power is indeed a revolutionary phenomena." This broad as-

sumption of wholly inferred powers has recently been criticised in the fifth intermediate report of the Select Committee to Investigate Executive Agencies.¹

The fact that Circuit Courts of Appeal or District Courts have upheld these inferred powers is all the more alarming to citizens who believe in the American doctrine of limited powers under the Constitution. Since the theory of inferred powers of administrative powers has within itself no effective limitation, it seems that the Congress is finding that administrative agencies and some courts are interpreting the language used in the legislation, granting powers in a way which goes far beyond any intent of the elected representatives of the people.

In war periods, court decisions sometimes go to extremes, under the emotional strain of the period. This was particularly instanced, in the First World War, by decisions from which Mr. Justice Holmes and Mr. Justice Brandeis expressed strong dissents.² All that Dean Pound seemed to me to suggest, in his article, was that the people themselves must impress upon the Congress the need for legislation which will impose upon the exercise of administrative authority reasonable limitations such as the courts may effectively enforce.

Mr. Field argues about the need in war time for rationing, and stresses the desirability of the objectives sought by the OPA. Neither Dean Pound nor the Committee of the San Francisco Bar Association argued that question. The discussion centered about the reliance upon the exercise of wholly inferred powers. If the powers are proper and are needed, they should be asked for and regularly obtained. Granting the force of Mr. Field's argument as to the desirability of the objectives, why should not the OPA itself ask the Congress, which is representative of the people, for express statutory

1. Fifth Intermediate Report of the Select Committee to Investigate Executive Agencies, April 24, 1944, H. R. Rep. No. 1366, Page 24.

2. *Toledo Newspaper Co. v. United States* 247 U.S. 402 (1918); *Abrams v. United States*, 250 U.S. 616 (1919); *United States v. Schwimmer* 279 U.S. 644 (1929). See also Zechariah Chafee *Freedom of Speech* (1920).

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delegation of this "necessary part of the allocation process?"

Mr. Field's statement that "Suspension orders are not issued as punishment" must be based upon a very legalistic interpretation of the word "punishment". Suspension orders do deprive the citizen affected thereby of his right of freedom of action, of his right to sell and distribute rationed articles. The suspension order may make worthless his place of business and the goodwill which he has built up by years of work. A gas station ordinarily cannot exist on the sale of other articles; practically it is out of business for the suspension period. Suspension orders may deprive, and in some instances have deprived, the citizen of his accustomed means of livelihood. To say that this is not a penalty or punishment seems to me to give a narrowed meaning to the words. Such actions are sanctions which affect and impair fundamental rights of citizens.

The inferring and exercise of drastic powers not expressly granted to the administrative agency can hardly be justified by showing that (1) the practice of the officers of the agency is not to exercise such powers or (2) that the administrative officers are of too fine a type and character to exercise the powers to the full and in any unfair or unjust manner. Inferring of powers not delegated is regulation by a government of men, not a government under law. It seems to me to be a strange argument that, admitting there are arbitrary and capricious acts, and perhaps unfairness, any such acts are subject to some judicial review. The place where justice and fair play and the observance of statutory limitations should be granted is in the administrative tribunals, the same as in courts of first instance. The average citizen should not be compelled to seek protection only through judicial review, which is never entirely satisfactory.

To try to answer the finding of the San Francisco Committee "that the suspension order is wholly in the discretion of the Hearing Commissioner", by saying that the suspension period may not exceed the period of rationing, seems to beg the question. What is the period of rationing to be? When will the war end? When will scarce articles now rationed become plentiful? Will rationing cease after victory by the armed forces? Even during the zealous days of prohibition, padlocking of premises for a violation of prohibition laws was limited by law.³

Mr. Field's defense of OPA procedure hardly sustains his claims. If anything, the contrary appears. He attempts to justify the procedure which the San Francisco Committee found inadequate after a factual examination, because he thinks the procedure is in line with the recommendations of The Attorney General's Committee on Administrative Procedure. The OPA procedural regulations have provisions which are excellent, but the provisions criticized by the Committee of the

San Francisco Bar Association were not in line with the recommendations of The Attorney General's Committee. For example: The Committee examined the "Notice of Hearing", which is the only complaint required to institute a hearing, and the Committee found one notice on a mimeographed form, which made the charge in the following language: "Under statement under Sec. 10-B, of Form R 1307". Certainly such a "notice" does not give "sufficient information to the accused with respect to the nature of the charge made against him," as recommended by The Attorney General's Committee. The OPA has itself admitted that the criticism made was just, because its revised procedural Regulation 4, effective April 1, 1944, changed the language, to adopt the wording which is now cited by Mr. Field, rather than the wording criticised. To suggest that the phrase "A clear statement of the charges against the respondent with reference to the particular section of the regulation or order alleged to have been violated" requires greater detail than the Rules of Civil Procedure, is unfounded; the Rules of Civil Procedure did not intend the pleadings to define the factual issues.⁴ The Rules of Civil Procedure provide for bills of particulars, full discovery, and pretrial procedure. So far as one can learn, there are no bills of particulars or discovery proceedings in the OPA suspension procedure. It is reassuring to note that the hearing commissioners are said to have interpreted this regulation strictly as requiring a more detailed statement than that generally held adequate in civil actions, but apparently this has been subsequent to the investigation and report by the Committee of the San Francisco Bar Association. The best assurance would be a Congressional law requiring the essentials of fair procedure by all administrative agencies.

The San Francisco Bar Association Committee found also that the notice given by the OPA was insufficient as to time. It pointed out the size of the territory, which comprised the States of Washington, Oregon, California, Arizona, Nevada, and part of Idaho. The Committee said: "A notice of five days before the hearing and the requirement of filing within three days of a request for hearing and a statement of the findings" gives too limited opportunity to the accused to attend to his other affairs and prepare his defense. Here again the OPA, in view of the Committee's criticism, evidently thought it was justified, because the OPA has since increased the period of notice from five to seven days, and the period for a request for a hearing from three to five days. Furthermore, the Hearing Officers under the new regulations of the OPA apparently have authority now to extend further these periods.

Mr. Field replies to the criticism that the regulations do not require the hearing to be held in the vicinity where the respondent resides, by mentioning that such a locality for the hearing is the practice of the OPA.

3. National Prohibition Act, 41 St. 305.

4. See discussion by Judge Charles E. Clark. Federal Rules of

Civil Procedure and Proceedings of the American Bar Association Institute, Cleveland (1938), Page 219, *et. seq.*

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If that is the practice, why does not OPA Procedural Regulation 4 make it a requirement, and thus avoid the criticism that under the present regulation a hearing can be held anywhere the hearing officer determines? Certainly, without such a protective provision the present procedure does permit of an oppressive action on the part of a hearing officer or administrator who may not have the high motives attributed to the personnel in the OPA.

Both the old and revised procedural regulations make the issuance of subpoenas discretionary. The OPA could readily comply with the recommendation of the Attorney General's Committee by changing the word "may" to "shall". Even better, they could adopt the provision in the American Bar Association's Administrative Procedure Bill, which carries out the recommendations of The Attorney General's Committee.

As to Dean Pound's criticism of the tendency on the part of administrative agencies, in their zeal to promote social ends, to avoid the limitations secured by fair and tested procedures which assure due regard for the rights of individuals, Mr. Field's reply fails to answer the factual criticism which the San Francisco Bar Association's Committee made, in finding that these "commissioners are guided by secret instructions which are not available to the public." Such "confidential instructions" negative the independence of the hearing officer. If the hearing officers are to act as quasi-judicial officers engaged in administering justice according to law, and if they are to be free from bias, influence or control by any other part of the agency, their independence and impartiality should be so openly asserted and fortified by the agency and its procedure that no one would have reason to doubt or challenge them.

Neither Dean Pound nor the Committee of the San Francisco Bar Association attacked or reflected upon the personnel of the OPA. The Committee spoke highly of the fairness of Judge McKeage, the Regional Hearing Officer, and also of the Regional Attorney. In spite of the serious defects in the procedural regulations, it was not suggested that these sincere men were wilfully misusing or even exercising extreme powers granted or assumed. This may be taken as generally true of most of those struggling with the tasks of the OPA.

The criticism which was made has fortunately resulted in some improvements in the OPA procedural regulations. The criticism was directed against those tendencies on the part of administrative agencies which threaten to impair our American system of justice and law. These powers, the San Francisco Committee felt, were drastic and too broad. It may be said, to paraphrase a remark which Senator Wheeler made on another great constitutional question, "that these powers are greater than a bad man should have or a good man should seek".

The stated desire and willingness of the OPA to improve its procedural regulations are to be commended.

I would be glad to see the whole matter approached, by Mr. Field and others of the OPA, always in the equitable spirit expressed by Mr. John M. Cate, of the Nashville Bar, District Enforcement Officer for the OPA, in the June issue of the *Tennessee Law Review*. Mr. Cate refers approvingly to "that splendid measure offered on February 28, 1944," by the House of Delegates of the American Bar Association. As to suspension order hearings in rationing cases, Mr. Cate argues that the procedure of the OPA now nearly "conforms to the best thinking of the day on administrative adjudications." He manifestly accepts and assumes the fairness of the standards of procedure recommended by the House of Delegates for enactment by the Congress at this time, so that conformance to them will not be left wholly to the voluntary action of the agencies as to particular types of cases. With such an approach to the subject of fair play for citizens and their rights, headway can and will be made toward attaining and requiring fair and adequate standards of justice under law.

Further study and amendment of the regulations of the OPA should result in a further improved procedure which will be fair, will fully protect the rights of individuals, and at the same time will fully promote the important purposes of the agency. Only after such a procedure is adopted and such an atmosphere of independence and impartiality is introduced will the public be prepared to accept the quasi-judicial determinations of administrative agencies with full confidence. Only then will the OPA gain that overwhelming support of public opinion which it has needed for carrying out its important work with full success.

Notice of Annual Meeting of Members American Bar Association Endowment

THE annual meeting of members of the American Bar Association Endowment will be held during the week of the annual meeting of the American Bar Association, September 11-15, 1944, for the election of a member of the Board of Directors for the term of five years and for the transaction of such other business as may come before the meeting. All members of the American Bar Association are members of the Endowment.

FRANK J. HOGAN

1877-1944

President of the American Bar Association, 1938-1939

A memorial sketch written at the request of the Journal

by William L. Ransom

Former President of the American Bar Association

FRANK J. HOGAN, one of the outstanding "courtroom" lawyers and the beloved friend of many members of the American Bar Association throughout the United States, died at his home in Washington, D. C., on May 15, at the age of 67.

He had been ill during more than two years, and had never been able to resume full activity in the practice of his profession after his retirement from the Presidency of the American Bar Association in 1939. He had not been able to attend a meeting of the Association or of the House of Delegates after his retirement from that office, but his keen interest in the work and policies of the Association continued throughout his illness.

His activity and leadership in the American Bar Association came after he had won recognition as one of the foremost trial lawyers and most trusted advisers in his generation. In 1930-31, he had served as President of the Washington Lawyers' Club; and in 1932-33 he was President of the District of Columbia Bar Association. By reason of his relationship to the latter organization, he organized the entertainment of the American Bar Association, when it held its Fifty-fifth Annual Meeting in Washington in 1932.

Thereby he became keenly interested in the national organization of the Bar, and he began to take an energetic part in its work. In 1933 he was elected to its Executive Committee and continued as a member

through 1936. In that capacity he served on the Budget Committee, and was its chairman for the Association year 1935-36. He strongly supported the movement for reorganizing the Association along representative lines, through the creation of the House of Delegates, which was accomplished, with his help, at the Boston meeting in 1936.



FRANK J. HOGAN

Elected President of the Association

The ability, energy and time which he had devoted so unstintingly to the advancement of the interests of the Association were recognized in his unanimous election as its President in 1938. He was the first District of Columbia lawyer to be chosen for that office. Characteristically, he laid aside his active professional work almost completely for that year, to do the best job he could do for the lawyers of America. At risk of health and with sacrifice of all leisure, he travelled extensively throughout the country, during his year as President, and brought the work and message of the Association forcefully home to many lawyers who had never before been interested in the Association. Although he

gave dynamic advocacy to practically every phase of the Association's program, he took the lead in aligning the organized Bar nationally in a cause which appealed strongly to his sense of justice and fair play. Believing deeply in the guaranties of individual freedom vouchsafed by the Bill of Rights and foreseeing that their

FRANK J. HOGAN

importance was enhanced as government became more centralized, he was concerned that lawyers, mobilized and led by the American Bar Association, should take the lead in defending and protecting, if need be, the civil rights of those individuals who otherwise might lack adequate presentation of their causes in the courts.

Creation of the Committee on the Bill of Rights

This militancy in behalf of the constitutional rights of men, even when their opinions or affiliations were such that he had no sympathy with them, led him to suggest and bring about, in 1938, the creation of the Association's Committee on the Bill of Rights. He appointed the first committee, planned the scope of its work, and devoted much time and energy to public advocacy of the vital principle of the defense of civil liberties, in which the Committee pioneered under his leadership.

All this was completely characteristic of his philosophy as to law and the lawyer. After his fee-less defense of many soldiers who became entangled with the law after World War I, he received the following tribute from the late Newton D. Baker, Secretary of War under President Woodrow Wilson:

The chief emotion I have now is admiration and gratitude for your knightly conduct in this matter. I am sure you will permit me to say that I am proud to be in a profession which you have dignified by your defense of the innocent and otherwise defenseless.

Leadership in Other Vital Matters

His insight into trends in government and law led him to foresee clearly the drift away from reliance principally on the courts to determine and enforce the constitutional boundaries between federal and state powers and the traditional limitations on the powers of government over the lives and property of its citizens. He boldly advocated during 1938-39 the restoration of legislative independence and vitality, as the needed bulwark for the American concept of government and the rights of citizens. His address as President of the Association in 1939 (25 A.B.A.J., 629) was challenging and provocative in its support of this thesis. It did not escape sharp criticism at the time, but more recently it has often been re-examined, as foretelling "the shape of things to come."

President Hogan also marshalled and directed the Association's support for the reform of abuses in the practices and procedures of federal administrative agencies. The Walter-Logan bill was passed by both Houses of Congress, but the expected veto frustrated its enactment.

A Saga of American Opportunity

The chronicle of his life dramatizes most strikingly the opportunities which the profession of law offers to

the youth of America. Mr. Hogan was born in Brooklyn, New York, on January 12, 1877. He was the son of Maurice and Mary E. (McSweeney) Hogan. His father died when Frank was five years old. This left him as one of three children dependent on their mother's work as a seamstress.

When Frank was seven years old, his health was so poor that his mother sent him to Charleston, South Carolina, to live with her sister, who was also a widow. Soon his mother moved to Charleston with the others of the family.

In this household, maintained by the work of the two women, Frank Hogan grew up with his younger cousin and lifelong confidant, James F. Byrnes, who also rose to place and power the hard way, serving successively as Congressman, Senator, and Associate Justice of the Supreme Court, and lately as Director of the Office of War Mobilization.

The Boy of Twelve Goes to Work

The future President of the American Bar Association attended the public schools in Charleston for a time, but at the age of twelve he had to go to work as a stock-boy in a local store. A stenographer helped him to learn shorthand, a skill which he retained and used throughout his life. Soon he became a stenographer and a railway clerk; later a brokerage clerk, and he worked for a time as a "cub reporter" on a local newspaper. Friends guided his avid reading of the best in literature, by which he made up for deficiencies in schooling.

The Spanish-American War in 1898 brought him opportunities for using both his proficiency as a secretary and his familiarity with the routing and handling of freight traffic in the congested South. He was one of the first Americans to become adept in the modern skills of logistics, then in infancy but now so vital in warfare. He went from his work as a civilian into the service of the Army of the United States, and served successively as secretary to the Chief Quartermaster of the Army for the occupation of Cuba, in 1898-99; secretary to the Quartermaster General in Washington, in 1899-1903; and Secretary to the Chief of Staff of the Army, in 1904. His capacity for hard work, his mastery of detail, and his unusual memory of men and events, marked him for steady advancement.

Studying and Practising Law Under Difficulties

Meanwhile, the young man had taken up the study of law at night, while carrying on his arduous work in the War Department by day. He finished the three-year course in two years, at the head of his class, and was graduated from Georgetown University in law in 1902 and began the practice of his profession in that year.

At first he retained his place in the War Department and practised law only after his hours of work. Thus

FRANK J. HOGAN

he was one of the lawyers known in Washington as "sun-downers," in that their work as lawyers began at sunset. Soon he was able to devote himself full-time to his work for clients. From 1912 to 1919, he lectured on the law of wills, evidence and partnership, in the School of Law of Georgetown University.

In 1899, he was married to Miss Mary Cecil Adair, of Savannah, Georgia; and his law studies dated from that event. Their daughter, Dorothy, who also survives him, is Mrs. John W. Guider, whose husband, Commander Guider of the United States Navy, has been active in the work of the American Bar Association.

Rise to Nation-Wide Recognition

The young Washington lawyer went steadily ahead, from 1902. Before long his skill as a trial lawyer became widely known, and he figured in many of the most conspicuous cases of his time, in which his success against obstacles commanded national attention. Soon he formed and headed a Washington law firm which attracted a large volume of business in general practice, unrelated to the sensational trials in which the head of the firm was the dynamic figure.

Among his "head-line" trials were his defense of the Riggs National Bank in litigation brought by the Comptroller of the Currency; the litigation involving Edward L. Doheny and the Pan-American Petroleum Company as to oil leases in the Elk Hills Naval reserves, and culminating in the acquittal of Mr. Doheny on charges of trickery and conspiracy to defraud the Government; his representation of the National Air Lines in their long contest with the Government; his vindication of the late Andrew Mellon against charges of failure to pay some \$3,000,000 in federal income taxes, and many others which were outstanding at the time. His battles were chiefly against indictments, charges and claims brought by Government. He never "pulled punches" in resisting what he believed to be arbitrary or unlawful action by Government.

Mr. Hogan's victories brought rich rewards in legal fees and professional recognition. He became probably the best-known lawyer in America; stories of his exploits and his reputed fees, became legends in the profession and among the general public.

His work for nationally-known clients naturally supplied the conspicuous incidents, but the poor and the humble often had his advice without fee and were given the help of his pre-eminent services.

His "Hobby" as to Rare Books and Manuscripts

His "hobby" became the collecting of rare editions of the world's best-known books. The boy who had to go to work as a clerk in a store at the age of twelve brought together on the top floor of his Washington home in Sheridan Circle one of the world's finest private collections of priceless books. He knew and loved

their contents. Even in his days and nights of hardest work, he gloried in obtaining first editions of classic books written for children, as well as original manuscripts of familiar poems which are a part of the heart-lore of America. He was vice president of the Shakespeare Association of America.

Many of his close friends expected him to leave his notable collection to some institution which would keep it together as a memorial to himself. This did not jibe with his thinking. He directed that his prized books be sold at auction in New York, so as to make them available again to others. He wrote in his will:

There is something sacred in the spiritual and intimate companionship of a book, and I do not deem it fitting that these friends of many happy hours should repose in unloved and soulless captivity. Rather, I would send them out into the world again to be the intimates of others whose loving hands and understanding hearts will fill the place left vacant by my passing.

Honorary degrees in recognition of his eminence and leadership in his profession came to him in numbers—LL.D. from his alma mater in 1925, D.C.L. from the University of Southern California in 1939, LL.D. from Manhattan College in 1939, and LL.D. from Laval University, in Quebec, Canada, in 1929. A Roman Catholic, Mr. Hogan visited the Holy Land in 1931, and received at special services in Jerusalem an award of the Equestrian Order of the Holy Sepulchre.

A Trusted Adviser and "Prince of Friends"

Along with all these successes and signal honors, there was developing for Frank Hogan another recognition which he probably valued most of all. He became the close friend and trusted adviser of many of the leading men of America—men of all parties in high office, men outstanding in the business world, men who worked closely with him in the American Bar Association.

He strikingly embodied the golden qualities of friendship. Men came to love him and prize his brilliant humor and his companionship. Always a generous host, his home in Washington was Mecca and meeting-place for men and women of all political and religious faiths, all manner of backgrounds and interests in the worth-while things of life. He loved them, and loved to have them in his home. His generosity was a part of his radiant spirit; triumph never turned his head nor created illusions about himself or obstinacies about others.

Above all, he was "a friend to man." Few lawyers in America have been well-known to so many people in all parts of American and in all walks of life. Few leaders in the American Bar Association have won and held the friendship and affection of so many in its ranks. This he counted the greatest honor and success of his career. His memory will last long as that of gallant contender in the tourneys of trial practice, but will last longest as that of "a prince of friends."

THE BATTLE CRY OF DEMOCRACY

By GEORGE R. FARNUM

of Boston

Former Assistant Attorney General of the United States

IN an inspiring passage in a drama written over two thousand years ago, one of the characters put a question which, in one form or another, constantly preoccupied the ancient Greeks: "Who is their shepherd over them, and lord of their host?" The chorus thundered back, "Of no man are they called the slaves or subjects." Here we catch something of the hot breath of that passionate aspiration toward a free way of life which the Greeks—and especially the Athenians—organized into the democratic city-state and which, with all its crudities and imperfections, has been one of the precious gifts of antiquity to the modern world.

For the Greeks, democracy was not merely an abstract conception of what "the good life" should represent in theory, but a practical and attainable ideal so exalted and impelling as to call for every sacrifice for its defense and preservation. Some of the most stirring and lofty chapters of their history are devoted to the fierce and protracted struggle in a bitterly hostile world to keep burning the lamp of freedom which they had lit.

In his immortal funeral oration at the end of the first year of the Peloponnesian War, Pericles, the great Athenian statesman, summed up, in words of unforgettable impressiveness, something of the great accomplishment: "Our government," he said, "is not copied from those of our neighbors; we are an example to them rather than they to us. Our Constitution is named a democracy because it is in the hands not of the few but of the many. Our laws secure equal justice for all in their private disputes, and our public opinion welcomes and honors talent in every branch of achievement, not for any

factional reason, but on grounds of excellence alone. And as we give free play to all in our public life, so we carry the same spirit into our daily relations with one another."

When finally, through internal quarrels and foreign wars, the vitality of the Attic race had become exhausted, and their simple ways and austere virtues had given place to a sophisticated attitude toward life and to habits of self-indulgence, and the great and golden days were over, the epic work which had been accomplished did not perish from the earth, but was handed down as a priceless legacy to posterity.

The most engrossing and significant chapters in subsequent history are concerned with the perilous and heroic adventures of the democratic ideal in a heterogeneous and unpredictable world. Now it has been reduced to a feeble flicker on the point of utter extinction; again it has been rekindled by the veering winds of changing opinion into a blaze that has diffused its welcome light over many lands and warmed the hearts of many people. Of its recent vicissitudes it has been said by an acute critic, Chester Maxey, "It was the great heresy of the eighteenth, the great experiment of the nineteenth, and the great quandary of the twentieth century." With the triumph of democracy in the first World War, its future seemed assured.

The dream, however, was tragically short lived. The high hopes were quickly deceived by the swift and unexpected turn of events. The champions of democracy fatally blundered. At the psychological time their leadership was weak and vacillating, and uninspired by the great vision that their cause demanded. In the course of two tragic decades all that had been won at such a grievous cost was lost. Democracy was brutally crushed out in a large

*Our Fathers in a Wondrous age
Ere yet the earth was small,
Ensured to us a heritage,
And doubted not at all
That we, the children of their
heart,
Which then did beat so high,
In later time should play like
part
For our posterity.*

Rudyard Kipling

part of the old world, and was probably saved from complete extinction by that incomparable fighting spirit and uncompromising love of freedom which have always characterized the English people. In this respect it is more than instructive to recall those brave words spoken by the younger Pitt in 1804 in the House of Commons during that anxious period when England was threatened by a Napoleonic invasion—

I need not remind the house that we are come to a new era in the history of nations; that we are called to struggle for the destiny, not of this country alone, but of the civilized world. We must remember that it is not for ourselves alone that we submit to unexampled privations. We have for ourselves the great duty of self-preservation to perform; but the duty of the people of England now is of a nobler and higher order. We are in the first place to provide for our security against an enemy whose malignity to this country knows no bounds; but this is not to close the views or the efforts of our exertion in so sacred a cause. Amid the wreck and the misery of nations, it is our just exultation, that we have continued superior to all that ambition or that despotism could effect, and our still higher exultation ought to be, that we provide not only for our own safety, but hold out a prospect to nations now bending under the iron yoke of tyranny, what the exertions of a free people can effect; and that at least in this corner of the world, the name of liberty is still revered, cherished, and sanctified.

(Continued on page 436)

Note: The series of biographies of eminent soldier-lawyers written by Mr. Farnum for the JOURNAL will be resumed in the next issue.

PRACTISING LAWYER'S GUIDE TO THE CURRENT LAW MAGAZINES

Administrative Law—Procedures of Federal Administrative Agencies—"Suspension Order Hearings of the Office of Price Administration in Rationing Cases": A candid and useful contribution to current discussions of the above topic is in the June issue of the *Tennessee Law Review* (Vol. 18—No. 4; pages 340-346). The author, John M. Cate, of the Nashville Bar, who is District Enforcement Attorney for the OPA, offers a "statement of how this power is exercised by the agency and how nearly this administrative procedure conforms to the best thinking of the day on administrative adjudication." Perhaps naturally, the justification is based on the present regulations and procedures of the OPA as to the particular type of order in rationing cases, rather than on those which were widely criticized. The author sticks to his thesis and does not discuss the subject of administrative law and procedures generally. "Neither is inquiry made," he says, "into the whys and wherefores of the action of the House of Delegates of the American Bar Association in excluding war agencies such as the Office of Price Administration from the operation of that splendid measure offered on February 28, 1944, as embodying comprehensively the procedures which should in the opinion of the Association be enacted by Congress at this time as to all of the Federal Administrative Agencies stated to be within its scope." The article is well documented by citations of the relevant directives and decisions, the Association's proposed Administrative Procedure Act, and the material appearing in this JOURNAL in its behalf. With a disarming approach so manifestly in accord with safeguarding the substance of due hearing and

fair play in administrative procedures, Mr. Cate makes an admirable presentation of the current procedures of the OPA as to the much-criticized suspension orders. In this respect it is worthy of emulation by others who write on the subject, and may well be obtained and examined by those who are left confused by other less candid discussions. (Address: *Tennessee Law Review*, 720 West Main Avenue, Knoxville, Tenn.; price for a single copy: 75 cents).

Bailment—"Rights and Duties of Bailor and Bailee Under the Law of Pennsylvania": An unusually complete assembling and analysis of the decisional law on the many phases of the above-quoted subject is in the April issue of the *Temple University Law Quarterly* (Vol. XVIII—No. 2; pages 199-236), by Maurice H. Brown, of the Philadelphia Bar. (Address: *Temple University Law Quarterly*, No. 35 South Ninth Street, Philadelphia, Pa.; price for a single copy: 75 cents).

Civil Law—"The Responsibility of the State as a 'Juristic Person' in Latin America": *The Tulane Law Review*, naturally devoted to the civil law and to comparative law, contains in its March issue a discussion of considerable timeliness and practical import, under the above-quoted title (Vol. XVIII—No. 3; pages 408-436). The contributor as to civil responsibility for damage inflicted on private persons is J. Irizarry Y Puente, a consultant in Latin-American law who is associated with the New York law firm of Cadwalader, Wickersham and Taft. (Address: *Tulane Law Review*, New Orleans, Louisiana; price for a single copy: \$1.00).

Editor's Note: This department of the JOURNAL is intended to provide a means by which the practising lawyer can find out if the current law reviews and other law magazines contain material which might be of interest and help to him in his professional work. Complete coverage of all material of merit in all of the publications is of course impracticable. Selection is made of articles, notes, editorials, etc., which, from the point of view of a lawyer in active general practice, seem likely to be useful perhaps to other lawyers in connection with subjects and questions of law which are current. No assurance can be given that an indicated article, etc., will be found helpful on the particular problem confronting the lawyer. Complete digests of the contents of the law magazines

will be found in the *Index to Legal Periodicals*, published by the American Association of Law Libraries.

Members of the Association who are interested in any of the articles, etc., referred to in this department will generally find the magazine obtainable on prompt request to the address given in parentheses, if accompanied by a remittance of the price stated for a single copy. If this experimental department proves to be useful to lawyers in acquainting them with available material, and it develops that copies of a current magazine listed are unobtainable from the publisher, the JOURNAL will be able to supply, at a price to cover the cost plus handling and postage, a planograph or other copy of any article, note, etc., which is desired. Request should be made first to the particular magazine.

GUIDE TO CURRENT LAW MAGAZINES

Contracts—War Powers of Government—"War Contract Termination"—Adjustment Problems—The Subcontractor Relationship: In its current issue, publication of which has been delayed by the rapid changes in statute law and departmental organizations and practices, the School of Law of Duke University presents a well-balanced and timely symposium as Part I of its consideration of War Contract Termination (Vol. X—No. 3; pages 427-560). This volume is a part of the notable series on Law and Contemporary Problems, and is based on the fact that the "termination problem" has assumed "in the view of many the position of the number two national problem—second only to winning the war." Most of the articles in Part I of the symposium are of an exploratory nature, but in scope and detail they are designed for practical usefulness to lawyers and their clients. The discussion is opened with an analysis of "The War Adjustment Problem," by Cecil E. Fraser, Assistant Dean of the Harvard University Graduate School of Business Administration, who spent the years 1930-1940 in private business, and has worked and written extensively in the specialized field of industrial mobilization and demobilization. Next follows a comprehensive and authoritative exposition of the policies and procedures for the termination of war contracts, with special emphasis on those of the War Department, by Leon Malman, of the New York Bar, now Chief of the Legal Unit of the Contract Termination Section of the Office of the Chief of Ordnance, under whose jurisdiction a large part of the current terminations come. This article is the most thorough-going and extensive which we have seen on the subject; it comprises 169 pages. Its practical character is attested by its adoption for use in the instructional program of the recently established Army Industrial College. The problems which stem from the hierarchy of prime, sub- and remote contractors are next treated in this symposium. John S. Carter, of the New York Bar, draws upon his experience as manager of contract terminations for the RCA Victor Division of the Radio Corporation of America, to write pragmatically regarding legal "Problems Arising Out of the Subcontractor Relationship." A contribution by Allen W. Madden, of the New York Bar, Director of the Government Contracts Division of the Research Institute of America, deals with the interesting proposals as to "Company Settlements." The final article, by Bertram M. Gross, Staff Director of the War Contracts sub-committee of the Senate Committee on Military Affairs, points out the need for legislation on the contract termination problem and suggests its desirable characteristics. Announcement is made that the publication of Part II is expected within a few weeks. (Address: Law and Contemporary Problems, Duke Station, Durham, N. C.; price for a copy of Part I: \$1.00. Part II may be ordered at the same time for \$1.00 additional).

Copyrights—The Copyright Act—International Law—"Copyright in a World at War": The leading article

in the May issue of the *Kentucky Law Journal* (Vol. XXXII—No. 4; pages 316-327) is under the above-quoted title and is contributed by Helen Stephenson, of the Kentucky Bar, now an attorney in the Legal Division of the Kentucky State Department of Revenue. Her analysis deals with the Copyright Act as amended from time to time, but chiefly from the new international angles of the copyright status of the writings of domiciled aliens, non-resident aliens or proprietors, stateless persons, etc., and the effects of war. (Address: Kentucky Law Journal, Lexington, Ky.; price for a single copy: \$1.00).

Corporations—"Elimination or Adjustment of Accrued Dividends on Cumulative Preferred Stock Issued by a Tennessee Corporation": This article by Ben Kohler, Jr., of the Chattanooga Bar, in the April issue of the *Tennessee Law Review* (Vol. 18—No. 3; pages 254-264), is stated to be limited to the dilemma which confronts a solvent corporation organized in Tennessee after the 1929 enactment of the general corporation laws, if it has to grapple with an accrual of dividends on its preferred stock. Actually, the discussion goes beyond the particular statutory provisions of the state, and is to some extent supplementary to the notable 1941 articles on "Elimination of Accrued Dividends in Corporate Reconstruction" (89 University of Pennsylvania Law Review, 789), which revealed the inchoate state of the law, and the comprehensive discussion of "Accrued Dividends on Cumulative Preferred Stocks: The Legal Doctrine" (55 Harvard Law Review, 71). The current article, whose author has evidently toiled over the kinks of advice and draftsmanship, has the realistic angles which this department is prone to encourage, but its predecessors should not be overlooked. (Address: Tennessee Law Review, 720 West Main Avenue, Knoxville, Tennessee; price for a single copy: 75 cents).

Courts—"Portrait of the New Supreme Court" of the United States: The first installment of a provocative discussion under the title above quoted is in the March issue of the *Fordham Law Review* (Vol. XIII—No. 1; pages 2-15). The author is Professor Walter B. Kennedy, Acting Dean of the Fordham University School of Law, who began in 1925 to warn against what he regarded as "the impending break-down of constitutional and common law, the erosion of the doctrine of *stare decisis*, and the skepticism regarding legal principles" (Pragmatism as a Philosophy of Law, 9 Marquette Law Review, 63). In his earnest article, Dean Kennedy deals with what the editors of the *Fordham Law Review* consider to be "the latest and most startling phase of the crumbling of legal precedents and case-law". The quotation and analysis of many decisions and dissents in the Court are offered as attempting "to make articulate the feelings of lawyers and laymen regarding the present situation"; also, as trying to be "constructive", by way of assistance to lawyers who wish to retain

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reasonable adherence to the concepts of *stare decisis*. (Address: Fordham Law Review, 302 Broadway, New York City; price for a single copy: \$1.00).

Courts—"Practice before the United States Court of Claims": In the *Tennessee Law Review* for February (Vol. 18—No. 2; pages 138-150), Paul Campbell, of the Chattanooga Bar, gave a helpful generalized presentation of the practice before the Court of Claims, which seems likely to become perforce a familiar tribunal for many lawyers and their clients, in the post-war adjustment of claims. The subject is treated from the angles which one would expect when the author has had years of practical experience, in representing the Government and later in behalf of private clients, before the Court of Claims. The article may be worth while for lawyers not yet versed in the practice before that particular tribunal. (Address: Tennessee Law Review, 720 West Main Avenue, Knoxville, Tennessee; price for a single copy: 75 cents).

Judgments—"Declaratory Judgments in Indiana": The leading article in the April issue of the *Indiana Law Journal* (Vol. 19—No. 3; pages 175-211), founded and published by the Indiana Bar Association and edited under the supervision of the Indiana University School of Law, is contributed by Professor Edwin S. Borchard, of the Yale University Law School, long a recognized authority in the field of declaratory judgments. The decisions reflecting the "somewhat checkered career" of the Uniform Act on Declaratory Judgments, adopted by Indiana in 1927, are strikingly depicted; and the author's considered opinion is given as to the present state of the Indiana law as to the availability of the declaratory procedure in the various types of situations in which it was intended to be applicable. (Address: Indiana Law Journal, 38 Maxwell Hall, Bloomington, Indiana; price for a single copy: 75 cents).

Legal Education—"The Trend of the Law and Its Impact on Legal Education": A brilliantly reasoned "note" in the April issue of the *Harvard Law Review* (Vol. LVII—No. 4; pages 558-564), is on the above-quoted subject, by United States District Judge Charles E. Wyzanski, Jr., of Massachusetts, lately Solicitor of the United States Department of Labor. The article is based on a speech delivered by Judge Wyzanski before the New York Harvard Law Review Association on February 23, 1944. "In an era where the Bar spends most of its time in administrative and legislative forums," he says, "and most of its thought upon the wise and sensible exercise of discretion, the law schools' position calls for examination." The stated thesis is examined from angles of the most advanced and exploratory thinking. The enlightened conclusion, which will be agreed with and acclaimed by lawyers who would be most reluctant to accept many of his premises, is that "With the churchmen and with the schoolmen, the lawyers stand as one of the great professions, en-

trusted with the task of shaping and transmitting the values of civilization. We have a major role in preserving what Professor Jaeger, borrowing a classical Greek term, has called the *paideia*—the cultural spirit—of our society. It is the mission of the American law school to preserve that spirit and aid its growth." (Address: Harvard Law Review, Cambridge 38, Mass.; price for a single copy: 75 cents).

Patents—"Potts v. Coe: Burden of Proof on Patent Applicant to Show 'Level of the Art' Among Fellow Employees Prior to Invention": The much-criticized decision of the United States Court of Appeals for the District of Columbia in *Potts v. Coe*, 140 Fed. (2nd) 470 (opinion by Justices Thurman Arnold and Justin Miller; Justice Edgerton concurring), is dealt with in an extensive "note" in the *Harvard Law Review* for April (Vol. LVII—No. 4; pages 564-571). The author is William Redin Woodward, Staff Member of the Radiation Laboratory of the Massachusetts Institute of Technology. The many challenging aspects of that drastic ruling are pointed out in a factual manner which is impressive because it eschews argument or controversy. The appellate court's resort to and reliance on "evidence" *dehors* the record is moderately viewed as "rather extraordinary." Mr. Woodward reminds that in these matters [of judicial notice] Professor Morgan acknowledges the privilege of courts to draw inferences from such material as it chooses," but Mr. Woodward admonishes that "Assuming that the courts do have this wide freedom, the proposal of the American Law Institute to require the judge to inform the parties of any matter to be judicially noticed and to afford them the opportunity to present relevant information on the question of the propriety of taking such notice or concerning the tenor of the matter noticed would seem eminently desirable. This is particularly true if the 'experience' recorded in the publications continually compiled by a galaxy of governmental agencies is all to be potential subject matter of judicial notice." The article is a useful contribution to the current controversy as to *Potts v. Coe*. (Address: Harvard Law Review, Cambridge 8, Mass.; price for a single copy: 75 cents).

Real Property Law—Promises Respecting the Use of Land—"Judge Clark on the American Law Institute's Law of Real Covenants: A Comment"—Judge Clark's Reply: Further installments in a notable controversy are in the March issue of *The Yale Law Journal* (Vol. 53—No. 2; pages 312-329). In the September issue (52 Yale L. J. 699), Judge Charles E. Clark, former Dean of the Yale Law School, now a United States Circuit Judge in the Circuit Court of Appeals for the Second Circuit, wrote unfavorably concerning the form and contents of the American Law Institute's Restatement of the Law of "Promises Respecting the Use of Land," tentatively adopted by the Institute in 1943. The principal point of attack was that part of the Restatement which

deals with the problem of the succession to the benefit or the burden, as the case may be, of such promises, through succession to the land respecting the use of which they were made. Specifically, Judge Clark's criticisms were directed against Sections 82 and 85 of this Restatement. In the March issue, Professor Oliver S. Rundell, Acting Dean of the University of Wisconsin Law School and Reporter for the Institute as to the subject of Servitudes, makes an animated explanation and justification of the sections of which he made the draft under attack. Dean Rundell points out many particulars in which he urges that Judge Clark has misapprehended the scope and applicability of the two sections, as well as the decisions which they were intended to state in perspective. Because the Institute undertakes as its "fundamental policy" to base its Restatements on the decided cases, and to accept the existing law, "not to make it," Dean Rundell's detailed reply to Judge Clark's criticisms, and Judge Clark's spirited comment on the Rundell reply (both in the same issue), consist chiefly of analysis of the many decisions, which are respectively claimed to support or refute the Restatement. For this reason, the articles will be interesting, and may be useful, to lawyers who have to deal with such covenants respecting land. When learned teachers of the law disagree so drastically, the average practising lawyer may be puzzled, but also aided, by the range of their divergences on arguable questions. Of broader interest may be the implications of Judge Clark's concluding statement that he planned his article of last September "as a case study of Institute juristic methodology" and that it seems to him that "Mr. Rundell's rebuttal is prime source-material for such a study." He declares that "It helps to explain, too, why those of us who cannot go along intellectually get shrift which is short, indeed, when the Institute machinery moves. After all, the Institute is a private organization, and there is no law to force it to any other course; the question still recurs whether the produce thus fashioned is to be taken as the authentic expression of American legal thought." (Address: The Yale Law Journal, Box 401A, Yale Station, New Haven, Conn.; price for a copy of the current issue: \$1.25).

Workmen's Compensation Laws—Overlapping "Jurisdiction of State and Federal Compensation Agencies over Injuries Occurring on Navigable Waters": The leading "note" in the March issue of *The Yale Law Journal* (Vol. 63—No. 2; pages 348-359) is an excellent exposition of the problems created or left, for employers and their counsel, by the decision in *Davis v. Department of Labor*, 317 U. S. 249, to which reference was made in our May issue (page 274). The decisions subsequent to *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917) are incisively reviewed, with the conclusion that

"neither the employer making contribution nor the marginal employee making application has been able to predict with any certainty the agency ultimately responsible for compensation." The lack of success of the efforts of the majority in the Court in the *Davis* case "to obviate the hazards resulting from this uncertainty" is penetratingly analyzed. The view is expressed that "The majority, while ostensibly adhering to the doctrine, would seem to have abandoned all attempt to give content to the *Jensen* line of demarcation," and that "Apparently, therefore, the marginal employee has the option of a recovery from either the state or federal agency irrespective of nice questions of jurisdiction providing he can prove a *prima facie* case under the requirements of the governing statute" (i.e., the law governing the agency before which he chooses to make his claim). This means that "the employer, who must qualify *before* the injury, may now be held equally liable for contribution under the state or federal statute at the choice of the claiming employee," and that "it is probable that the majority's decision will increase this risk." Although some employers may protect themselves against double liability by insurance policies covering both Acts," the use of insurance for such a purpose is circumscribed." The Federal Act permits private insurance, but in six states compulsory state compensation funds eliminate the possibility of a double policy entirely." The note points out that the high cost of such double policies, ranging up to 65 per cent over usual compensation rates, "renders them an unsatisfactory substitute for certain liability under one Act." The author of the note is doubtful as to the feasibility of dealing remedially with the situation by legislation so long as the Supreme Court adheres to the *Jensen* boundary of demarcation, which the federal statute has been interpreted as incorporating. It may be pointed out that the difficulties stem from the policy or practice of the Court in "respecting" presumptions arising from the findings of whichever agency first determines that it has jurisdiction on a *prima facie* showing, without accepting judicial responsibility for enforcing the constitutional demarcations between state and federal authority over workers. The administrative determination of the constitutional question is in effect left absolute, if the agency finds for its own jurisdiction. Chief Justice Stone raised (317 U. S. 249, 262-63) the following objection to the majority's solution: "the . . . doctrine does not reveal . . . what the function of this Court is to be in cases where the federal and state commissioners both find against jurisdiction." In any event, lawyers for employers and workers may find this note extremely useful. (Address: The Yale Law Journal, Box 401A, Yale Station, New Haven, Conn.; price for a single copy: \$1.25).

SIXTY-SEVENTH ANNUAL MEETING

CHICAGO, SEPTEMBER, 1944

TENTATIVE SCHEDULE

Friday, September 8

Morning

Section of Patent, Trade-Mark and Copyright Law,
General Session

Afternoon

Board of Governors
Section of Patent Trade-Mark and Copyright Law,
General Session

Saturday, September 9

Morning

Board of Governors
Council of the Junior Bar Conference
Section of Patent, Trade-Mark and Copyright Law,
General Session
Council of the Section of Taxation

Noon

International Association for the Protection of Industrial Property—Luncheon

Afternoon

Board of Governors
Council of the Junior Bar Conference
Section of Patent, Trade-Mark and Copyright Law,
General Session

Evening

Section of Patent, Trade-Mark and Copyright Law,
Dinner

Sunday, September 10

Morning

Council of the Section of Corporation, Banking and
Mercantile Law
Council of the Section of Insurance Law
Council of the Junior Bar Conference
Council of the Section of Legal Education and Ad-
missions to the Bar
Section of Taxation, General Session

Afternoon

Committee on War Work
Council of the Section of Corporation, Banking and
Mercantile Law
Junior Bar Conference, General Session
Council of the Section of Legal Education and Ad-
missions to the Bar
Section of Taxation, General Session

Monday, September 11

Morning

THE ASSEMBLY OF THE ASSOCIATION

Noon

Luncheon of Council of the Section of Real Prop-
erty, Probate and Trust Law

Afternoon

HOUSE OF DELEGATES

Section of Insurance Law, General Session
Section of International and Comparative Law
Section of Judicial Administration
Junior Bar Conference
Section of Public Utility Law
Section of Real Property, Probate and Trust Law,
General Session
Section of Taxation, General Session.
Committee on Improving the Administration of
Justice

Evening

ASSEMBLY

Tuesday, September 12

Morning

Section of Bar Activities
Section of Corporation, Banking and Mercantile Law
Section of Criminal Law
Section of Insurance Law—Round Tables:
Automobile Insurance Law
Fire Insurance Law
Fidelity and Surety Insurance Law
Health and Accident Insurance Law
Workmen's Compensation and Employers' Liability
Insurance Law
Section of Judicial Administration
Junior Bar Conference, General Session
Section of Legal Education and Admissions to the
Bar, Jointly with Conference of Bar Examiners
Section of Mineral Law
Section of Municipal Law
Section of Public Utility Law
Section of Real Property, Probate and Trust Law:
Real Property Division
Probate and Trust Divisions
Special Committee on Improving the Administration
of Justice.

Noon

Section of International and Comparative Law,
luncheon

Tuesday, September 12

Afternoon

Section of Corporation, Banking and Mercantile Law
Section of Criminal Law
Section of Insurance Law—Round Tables:
Marine and Inland Marine Insurance Law
Aviation Insurance Law
Casualty Insurance Law
Insurance Practice and Procedure

PROPOSED AMENDMENTS

Life Insurance Law
 Section of International and Comparative Law
 Section of Judicial Administration
 Section of Legal Education and Admissions to the Bar, jointly with National Conference of Bar Examiners
 Section of Mineral Law
 Section of Municipal Law
 Section of Real Property, Probate and Trust Law, General Session
 Section of Taxation—round table
Evening
 Section of Insurance Law—dinner

Morning **Wednesday, September 13**
 ASSEMBLY

Afternoon
 HOUSE OF DELEGATES
 Section of Insurance Law, general session
 Section of International and Comparative Law
 Association of American Law Schools

Evening
 Annual Dinner of the Association

Thursday, September 14
Morning
 ASSEMBLY

Upon adjournment of the Assembly
 HOUSE OF DELEGATES
 Upon adjournment of the House of Delegates
 ASSEMBLY

PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE AMERICAN BAR ASSOCIATION

*To be presented and acted upon at its Sixty-seventh
 Annual Meeting at Chicago, Illinois, September 11-14, 1944*

TO the Members of the American Bar Association and of the House of Delegates:

I

Notice is hereby given that Howard L. Barkdull, of Cleveland, Ohio, George L. Bond, of Syracuse, New York, William Clarke Mason, of Philadelphia, Pennsylvania, George M. Morris, of Washington, D. C., and William L. Ransom, of New York City, members of the Association and members of the Committee on Rules and Calendar of the House of Delegates have filed with the Secretary of the Association the following amendments to the Constitution of the Association:

(1) Amend Article V, Section 5, by inserting after the words "State Delegate" in line 53 the words "other than the delegate from Hawaii, Puerto Rico or the territorial group,"; and by striking out in lines 57 and 58 the words "(or the territorial group)"

so that the sentence in Article V, Section 5, beginning on line 52, will read:

"If a State Delegate, other than the delegate from Hawaii, Puerto Rico or the territorial group, shall fail to register in attendance at any annual meeting of the Association by twelve o'clock noon on the opening day thereof, the office of such State Delegate shall be deemed to be vacant; and thereupon the members of the Association present at the meeting from his State shall convene and elect a successor to serve until the vacancy shall be filled by nomination and election as hereinabove provided."

(2) Amend Article VII by striking out the entire article in present form and in lieu thereof inserting the following:

Section 1. President, Secretary and Treasurer.—The following officers shall be elected at each annual meet-

ing of the House of Delegates, by a majority vote of those present and voting, and shall serve for the year beginning with the adjournment of the annual meeting at which they are elected and ending with the adjournment of the next annual meeting of the House of Delegates:

A President, who shall not thereafter be eligible for election to that office;
 A Secretary; and
 A Treasurer.

Section 2. Chairman of the House of Delegates.—A Chairman of the House of Delegates, chosen from the membership of the House of Delegates, shall be elected at the annual meeting of the House of Delegates in even-numbered years beginning in 1944, by a majority vote of those present and voting, and shall serve for the term of two years beginning with the adjournment of the annual meeting at which he is elected and ending with the adjournment of the second following annual meeting of the House of Delegates. He shall not thereafter be eligible for election to that office.

Section 3. Vacancies.—If any office shall become vacant, the office shall be filled by the Board of Governors, for the remainder of the term.

Section 4. Executive Secretary, Assistant Secretaries, Assistant Treasurers.—The Board of Governors may elect, and may prescribe the duties of, an Executive Secretary, one or more Assistant Secretaries and one or more Assistant Treasurers, each of whom shall hold office at the pleasure of the Board of Governors. The Executive Secretary and other employees need not be members of the Association.

(3) Amend Article VIII as follows:

Section 1. In lines 6 and 7 strike out the words "Chairman of the House of Delegates,". After line 8 insert the following: "in even-numbered years, they shall

PROPOSED AMENDMENTS

nominate a Chairman of the House of Delegates." so that the first two sentences in Article VIII, Section 1 will then read:

"The State Delegates from each State (and the Delegate from the territorial group) shall meet, not later than seventy days before the opening of the annual meeting in each year, and shall make, and promptly announce and publish, a nomination for each of the offices of President, Secretary, and Treasurer, and for the members of the Board of Governors to be elected in that year. In even-numbered years, they shall nominate a Chairman of the House of Delegates."

In line 46 strike out the words "each of" and the words "for the" so that the last two sentences in Article VIII, Section 1 will then read:

"If a majority of the votes cast shall be in favor of not holding said nominating meeting in that year, then said nominating meeting shall not be held and the State Delegates in that year, in lieu of making nominations at such nominating meeting, shall make a nomination for the offices of the Association and members of the Board of Governors to be elected in that year, by mail ballot to be conducted in such manner and at such time as shall be determined by the President of the Association, the Chairman of the House of Delegates and the Secretary of the Association. The Secretary shall promptly announce and publish the nominations so made."

Section 2. In line 8 strike out the words "Chairman of the House of Delegates,". In line 9, after the word "Treasurer" change the period to a comma and insert the following: "and in even-numbered years, for Chairman of the House of Delegates." Line 10, after the word "meeting" strike out the comma and insert "in even-numbered years,"

so that the first two sentences in Article VIII, Section 2, will then read:

"Not earlier than seventy days nor later than forty days before the opening of the annual meeting, one hundred members of the Association in good standing, of whom not more than fifty may be accredited to any one State, may file with the Secretary a nominating petition (which may be in parts) duly signed, making other nominations for the office of President, Secretary or Treasurer, and in even-numbered years, for Chairman of the House of Delegates. Not earlier than seventy days nor later than forty days before the opening of the annual meeting in even-numbered years, fifteen members of the House of Delegates may file with the Secretary a nominating petition (which may be in parts) duly signed, making other nominations for the office of Chairman of the House of Delegates."

II

Notice is also given that the aforesaid members of the Association and of the Committee on Rules and Calendar of the House of Delegates have filed with the Secretary of the Association the following amendments to the By-Laws of the Association:

(1) Amend Article IV, Section 2, of the By-Laws by striking out the entire Section in present form and in lieu thereof inserting the following:

Committee Reports. When a printed report of a Committee recommends action, such recommendation shall be set forth as a recommendation at the head of the report so as to distinguish readily the recommendation from the body of the report. The body of the report shall contain no language which may be construed as committing the Association to any policy not contained in the recommendations.

(2) Amend Article X, Section 20, of the By-Laws by striking out the entire Section in present form and in lieu thereof inserting the following:

Printing of Reports of Committees. Unless otherwise ordered by the Board of Governors, (a) all committees may have their reports printed by the Secretary prior to a meeting of the House of Delegates; (b) any report containing any recommendations for action shall be printed and distributed by mail by the Secretary to all members of the Association at least 30 days before the annual meeting or to all members of the House of Delegates at least 10 days before any special meeting, at which such report is proposed to be submitted; (c) when the recommendation proposes or opposes legislation the report shall be accompanied by a copy of the bill or by a summary of its provisions; and (d) when a report on legislation is not accompanied by a copy of the bill, the committee shall make available for distribution at the meeting at which the report is to be considered at least 50 copies of the bill.

(3) Amend Article XI of the By-Laws, and the title thereof, by striking out the entire Article and the title thereof, in present form, and in lieu thereof inserting the following:

Representation of Association by Section or Committee. No Section or Committee shall assume to represent the Association or any Section or Committee thereof before any legislative body, in any Court or before any other tribunal, unless authorized so to do by the House of Delegates or by the Board of Governors.

(4) Amend Article XII, Section 6, of the By-Laws by striking out the entire Section in present form and in lieu thereof inserting the following:

Reports of Sections. Unless otherwise ordered by the Board of Governors, (a) all Sections (except as hereinafter provided) shall have their reports printed or mimeographed and distributed to members of the House of Delegates prior to the meeting at which such report is to be considered; (b) when such report recommends action, such recommendation shall be set forth at the head of the report, as a recommendation, so as to dis-

(Continued on page 432)

AMERICAN BAR ASSOCIATION JOURNAL

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Invasion and Liberation

IN the dawn of Tuesday, June 6, 1944, when the sun finally rose over the beaches of Normandy it saw (and the moon had stayed to watch, too) a canopy of airplanes thicker even than the clouds, and below—battleships, cruisers, destroyers, mine-sweepers, and the landing barges in serried ranks.

A gale was blowing, the Channel was treacherous, some delay was inevitable, part of the surprise element had gone. At the beaches was an interlaced system of underwater obstacles, sea and land mines, wire, tank traps, machine gun nests, concrete emplacements for heavy guns—all backed up by an enemy full division.

A war correspondent on the spot wrote, "Now that it is over, it seems to me a pure miracle that we ever took the beach at all. I tell you so that you can know and appreciate and forever be humbly grateful to those both dead and alive who did it for you."

On the home front, June 6, 1944 was a day of prayer and dedication in homes and in thronged churches. As D-day was a military secret, there has been no proclamation. None was needed. Instinctive was the appeal to Almighty God to safeguard our men and to march with our banners.

Throughout the world there was a deep undercurrent of thought. Why cannot statesmen and lawyers abolish this horror? The peoples are hearing these sayings: "If the price of total sovereignty is total war, the price is too great." "In peace, sons bury fathers; in war, fathers bury sons." "Must man fight to demonstrate again the already demonstrated—that peace is better than war, that liberty can exist only under law?" And millions recall what each learned at his mother's knee; at Gethsemane Christ said: "All they that take the sword shall perish with the sword."

Anglo-Saxon lawyers know that even private disputes between individuals once were settled by ordeal of battle. Centuries ago, that was suppressed and outlawed in favor

of adjudication in the courts administering justice according to law.

Today when nations have a quarrel they revert to trial by combat. This surely is a monument to the irresponsibility of the world political structure. The terrific strides of science and technology make it plain that if we do not avert it, a World War III would result in the annihilation of mankind. Already we have monsters of the air which can roam in the stratosphere and unloose their lethal bombs with impunity.

The tragedy is that such carnage *can* be avoided if peoples of good will unite in supporting the only possible alternative.

That is, Justice among nations under international law.

The basis for international law, international procedures, and an international court already exist. True, they are not perfect. To make them more nearly perfect is the assigned task of statesmen, jurists, and lawyers.

It is not sound to criticize international procedures and institutions because of imperfections. Our domestic legal procedures and judicial institutions also have their own imperfections.

The task can be put this way:

Would not the first soldier who struggled onto the beachhead prefer to have these disputes (which have brought him to his present desperate pass settled by some system of law and justice among nations exactly as he knows that, back at home, disputes in the family, the town, the state, or the nation, were openly tried and finally determined according to justice under law?

The Invasion is on! The Invasion will continue until Nazidom is forced to unconditional surrender and the subjugated countries are liberated.

Are we lawyers at our own posts of duty? We have to think, think quickly, and think straight. By writing and speaking we can help to educate our own communities; they have the right to look to us now. In this great field, lawyers have a special training, a certain facility, and a rare opportunity.

We are challenged to set up law as against both anarchy and despotism.

The chance is ours.

The Fire Insurance Case and Interstate Commerce

BY a four-to-three vote the Supreme Court of the United States has decided that the business of fire insurance is interstate commerce and that combinations and conspiracies to limit competition and foster monopoly in that field are subject to the restraints of the Sherman Act.

That case is reviewed in this issue and is a matter of

special interest to the Bar. Attention is called to that part of the dissenting opinion in which the Chief Justice says, *arguendo*, "The practice of law is not commerce, nor, at least outside of the District of Columbia, is it subject to the Sherman Act . . ." (259 U. S. 200, 209). This question was viewed at one time with concern by the members of our profession, particularly as to the necessity of law firms' complying with the Fair Labor Standards Act. While this pronouncement is not controlling it fortifies the view generally held by the profession, that the Fair Labor Standards Act is not applicable to lawyers.

Our Cover

JULY is the month in which we set aside one day on which we salute our Flag and call to memory its history and the achievements of those who have marched under its colors. The memories inspired by that history and by those achievements create and increase our devotion to the principles on which our forefathers founded a government devoted to justice, freedom, and equality before the law.

This is also the month in which those of us who cannot serve in the armed forces of our nation have enlisted in the volunteer army engaged in the campaign for the Fifth War Loan. For the success of our campaign against those who seek to take from us and from all others, by force, the wealth of the world, and to dominate its peoples, some are giving their all, their very lives. Can we do less than our utmost to insure them victory?

And so for the month of July we give the place of honor, our front cover, to our Flag and to the marching army of War Bonds.

Proposed Amendments to Federal Rules of Civil Procedure

THE Standing Advisory Committee has now presented to the Supreme Court amendments to the Federal Rules of Civil Procedure pursuant to instructions of the Court that the Committee examine all opinions of federal courts which disclose that trouble has ensued in their operation.

The Court has instructed the Committee to have the proposed amendments printed and distributed to all federal judges, district attorneys, all state and local bar associations, and all committees which served on the examination of the original rules,—3500 copies will be available and will be mailed without charge to those whose

applications are received before the supply is exhausted. Address: Advisory Committee on Rules of Civil Procedure, Supreme Court Building, Washington 13, D. C.

State and local bar associations and all others who desire to participate in the improvement of federal procedure must act without delay for it is planned to present to the Court, September 25, all reports and suggestions received before that date.

At the present time it is deemed important to emphasize one feature of this task, namely, a proposed rule regulating procedure in the exercise of the Government's power of eminent domain in the taking of private property for public use. The war emergencies have involved the exercise of that governmental power to an extent hardly realized and difficult to appreciate.

A Rule on Condemnation was prepared by the Advisory Committee in 1938 but at the request of the Attorney General that rule was withdrawn because at that time it had not been possible to reach a complete accord on some important questions. The Federal Rules of Civil Procedure therefore provided that condemnation procedure in all federal courts should continue to be governed by the Conformity Act. The passage of time and the valued cooperation of the Lands Division staff of the Department of Justice, have brought about an almost complete accord and the last vestige of the old Conformity Act seems fairly on the way to being removed.

The proposed Condemnation Rule will be closely examined by federal judges, district attorneys, and all officials of the Government and its agencies. It should also be carefully examined by members of the Bar who may be called upon to represent those citizens whose private property is sought to be taken by the Government for public use.

Chairmen of Judiciary Committees Sponsor the Association's Bill

THE proposed Administrative Procedure Act approved and urged by the House of Delegates on February 28, 1944, has been introduced in both Houses of the Congress by the Chairmen of the respective Committees on The Judiciary.

The House bill is known as H.R. 5081, by Congressman Hatton W. Sumners, of Texas. The Senate bill is S. 2030, and has been introduced by Senator Eastland, of Mississippi, for Senator McCarren, of Nevada, Chairman of the Senate Judiciary Committee, who will sponsor the bill but is absent in the West.

Bar Associations, individual lawyers and other citizens who wish to urge the early enactment of the Association's remedial bill may now relate their support to the indicated bill numbers.

REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

Statutes—Federal Legislation Regulating Congressional Elections

State election officers conspiring to stuff the ballot box in a congressional election are subject to the penalties imposed by federal legislation under Section 19 of the Criminal Code.

United States v. Saylor, et al., 88 L. ed. Adv. Ops. 1006; 64 Sup. Ct. Rep. 1001; U. S. Law Week 4409. (Nos. 716-717, argued April 28, decided May 22, 1944).

The question in this case is whether election officers at an election for a United States Senator are guilty of crime for stuffing ballot boxes and are therefore punishable under Section 19 of the Criminal Code which provides that "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States" . . . they shall be punished.

The indictment charged that in an election held in Kentucky for the purpose of electing a United States Senator, the defendants served as officers of election; that they conspired to injure and oppress citizens of the United States legally entitled to vote, at the places where the defendants officiated, in the free exercise of and enjoyment of rights guaranteed to citizens by the Constitution and laws, namely, the right to express by their votes their choice of a candidate and to have their expressions of choice given full value and effect by not having their votes impaired or diluted by fictitious ballots fraudulently cast and given effect in the election. The indictment went on to charge that the defendants removed blank ballots from the ballot-book, forged and voted them for a candidate in opposition to those for whom the injured voters had voted.

The District Court, ruling on a demurrer, decided only that the indictment charged no offense against the laws of the United States.

On direct appeal to the Supreme Court the judgment was reversed in an opinion by Mr. Justice ROBERTS. The opinion points out that no contention was made as to any lack of power by Congress to punish the conspirators charged in the indictment. The sole question was whether Section 19 embraces a conspiracy by election officers to stuff a ballot box in a congressional election. The opinion discusses *United States v. Mosley*, 238 U. S. 383, and *United States v. Bathgate*, 246 U. S. 220. In the *Mosley* case, the Court had sustained an indictment

charging election officers with rendering false returns by disregarding certain precincts returns and thus falsifying the count of the votes cast. In the *Bathgate* case, the ruling was that an indictment charging persons conspiring to deprive a candidate for office by bribing voters participating in a congressional election did not fall within Section 19.

Holding that the present case is governed by the ruling in the *Mosley* case, Mr. Justice ROBERTS says:

If the voters' rights protected by § 19 are those defined by the *Mosley* case, the frustration charged to have been intended by the defendants in the present cases violates them. For election officers knowingly to prepare false ballots, place them in the box, and count them, is certainly not honestly to count the votes lawfully cast. The mathematical result may not be the same as would ensue throwing out or refusing to count votes lawfully cast. But the action pursuant to the conspiracy here charged constitutes the rendering of a return which, to some extent, falsifies the count of votes legally cast. We are unable to distinguish a conspiracy so to act from that which was held a violation of § 19 in the *Mosley* case.

It is urged that any attempted distinction between the conduct described in the *Bathgate* case and that referred to in the *Mosley* case is illogical and insubstantial; that bribery of voters as badly distorts the result of an election and as effectively denies a free and fair choice by the voters as does ballot box stuffing or refusal to count or return the ballots. Much is to be said for this view. The legislative history does not clearly disclose the Congressional purpose in the repeal of the other sections of the Enforcement Act, while leaving § 6 (now § 19) in force. Section 19 can hardly have been inadvertently left on the statute books. Perhaps Congress thought it had an application other than that given it by this court in the *Mosley* case. On the other hand, Congress may have intended the result this court reached in the *Mosley* decision. We think it unprofitable to speculate upon the matter for Congress has not spoken since the decisions in question were announced, and the distinction taken by those decisions has stood for over a quarter of a century. Observance of that distinction places the instant case within the ruling in the *Mosley* case and outside that in the *Bathgate* case.

Our conclusion is contrary to that of the court below and requires that the judgments be reversed.

Mr. Justice DOUGLAS, Mr. Justice BLACK and Mr. Justice REED dissented in an opinion which urges that Congress by the repeal of the reconstruction legislation intended to withdraw federal controls from elections and to leave their regulation to the states.

The case was argued by Mr. Paul A. Freund for the Government and by Mr. Harry B. Miller for Saylor.

*Assisted by JAMES L. HOMIRE, MARK H. JOHNSON, and HOWARD O. COLGAN.

Municipal Drainage Bonds—Enforcement of Bondholders' Lien by Sale—Right of State to Give the Purchaser Title Free from Prior Tax Liens

Michigan statutes providing that property delinquent in payment of drainage assessments be sold free and clear of all prior tax liens, do not impair the obligation of a contract claimed to have arisen from a prior statute which provided that in case of failure to realize sufficient funds from one assessment, a second assessment shall be levied for the payment of the deficiency.

Keefe v. Clark et al., 88 L. ed. Adv. Ops. 1004; 64 Sup. Ct. Rep. 1072; U. S. Law Week 4408. (No. 634, argued April 27 and 28, decided May 22, 1944).

Keefe and Bradford were owners of certain drainage bonds issued under the provisions of a Michigan statute in special assessment drain cases. There was a deficiency in the collection of funds sufficient to pay the assessments levied for the cost of the improvement. The original statute provided that "if there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds to retire them, the commissioner should at once levy an additional assessment in an amount sufficient to make up the deficit. Thereafter two statutes were passed by the Michigan legislature which provide that parcels of land subject to special assessment for drain projects may be sold for unpaid taxes and that the purchaser at the second sale should be granted a title free from all encumbrances, including all assessments for drain projects already constructed. The bondholders claimed that the two later Acts were unconstitutional because they impaired the legality of a contract arising out of the earlier statute above referred to. The Supreme Court of Michigan rejected that argument and held that the "serious consequences of such a hobbling of the state's powers to meet pressing problems" could not be countenanced and that the power of the state to sell tax-delinquent lands free of the burden of assessments for completed drain projects, was essential "not only to protect the bondholders themselves but to protect the public interest." The court declined to read into the statute any purpose to permit drain districts to surrender the state's sovereign power to provide for the sale of tax-delinquent property free of encumbrances. The case was appealed from the Supreme Court of Michigan to the Supreme Court of the United States and the judgment of that court affirmed.

Mr. Justice BLACK delivered the opinion of the Court and on the question of the contract and of the impairment of its obligation he says:

Before we can find impairment of a contract we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation alleged to have been impaired be clearly and unequivocally expressed. This rule of construction applies with special force in the case at bar, for the interpretation of the bond contract urged by appellants would result in a drastic limitation upon the power of Michigan to enact legislation designed to remedy a situation ob-

viously inimical to the interests of both municipal creditors and the general public.

• • •

We do not find in the provision of the drain statute relied upon by appellants a clear and unequivocal purpose of Michigan to permit drain districts to bargain away the state's power to sell tax-delinquent lands free of encumbrances. Long before the date when appellants' bonds were issued, the Michigan Supreme Court had held that, "The general rule is that a sale and a conveyance (by the state) in due form for taxes extinguishes all prior liens, whether for taxes or otherwise. This rule is one of necessity, growing out of the imperative nature of the demand of the government for its revenues."

• • •

... The provision of the drain statute upon which appellants rest their case does not expressly purport to alter this "rule of necessity." On its face it deals only with the levy of an additional assessment in the event that drain bonds are not paid in full at maturity, and does not assume to deal with the manner of selling tax-delinquent properties in drain districts or the kind of title that can be conveyed at such sales. "The language falls far short of subjecting lots which have been sold to pay tax or assessment liens to an additional assessment for the deficit. Such a construction would defeat the remedy of tax sales as a means of realizing the assessment lien."

Mr. Justice ROBERTS concurred in the result. Mr. Justice MURPHY took no part in the consideration or decision of this case.

The case was argued by Mr. Irvin Long for Keefe and by Mr. Harry J. Merritt and Mr. William Clarence Hudson for Clark.

Federal Statutes—The White Slave Traffic Act—Appellate Procedure—Rule IV, Criminal Appeals Rules

What Congress has outlawed by the Mann Act is the use of interstate commerce as a calculated means for effectuating sexual immorality, but an interstate trip undertaken for an innocent vacation purpose constitutes the use of interstate commerce for that innocent purpose.

Mortensen v. U. S., 88 L. ed. Adv. Ops. 924; 64 Sup. Ct. Rep. 1037; U. S. Law Week 4365. (No. 559, argued March 9 and 10, decided May 15, 1944).

Hans Mortensen and his wife, keepers of a house of prostitution in Grand Island, Nebraska, planned an automobile trip to Salt Lake City, Utah. Two girls employed in that house as prostitutes asked to be taken along on a vacation and the Mortensens agreed to the request. They motored to Yellowstone Park and to Salt Lake City, where they all stayed in a tourist camp four or five days and also visited Mrs. Mortensen's parents. The four then returned in the Mortensens' automobile to Grand Island and went immediately to the Mortensens' house of ill fame and continued to act as prostitutes for a year or more after their return from Salt Lake City.

The Mortensens were prosecuted in the District Court, found guilty by verdict of a jury under Section 2 of the Act; the judgment was affirmed by the Circuit

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Court of Appeals. The Supreme Court took the case on certiorari, and reversed the judgment of the lower court.

In the District Court defendants failed to file a timely bill of exceptions. Thereafter they applied to the Circuit Court of Appeals for an extension of time to settle and file it. The motion was denied but later when the case came on for argument before another division of that court, counsel was allowed to leave with the court, but not file, the reporter's transcript of the evidence, in order that the court might see that "no fundamental injustice had been done" because of the absence of a bill of exceptions. The court then treated the case as though the transcript was properly before it, and sustained the conviction on the merits.

Mr. Justice MURPHY delivered the opinion of the Court.

The question of procedure was first taken up and it was held that under Rule IV of the Criminal Appeals Rule, the Circuit Court of Appeals has the right to exercise some judicial discretion in supervising and controlling the proceedings on appeal and that under the peculiar circumstances of the case it was unnecessary to decide whether the court below abused its discretion in refusing to allow a bill to be filed, because both in the Court of Appeals and in the Supreme Court the situation was as though the transcript had been formally made a part of the record.

Taking up the questions of intent and compulsion, Mr. Justice MURPHY says:

It is undisputed that this was purely a vacation trip, with the two girls paying their own living expenses and petitioners bearing the expenses of transportation. One of the girls had offered to help pay for the transportation, but petitioners refused on the ground that the cost would remain the same even if the girls did not accompany them. No acts of prostitution or other immorality occurred during the two-week trip and there was no discussion of such acts during the course of the journey. Both girls testified that during the trip they gave no consideration to their work as prostitutes and made no plans to abandon such activities. There was also uncontradicted evidence that the two girls were under no obligation or compulsion of any kind to return to Grand Island to work for petitioners. They were free at any time before, during or after the vacation excursion to leave petitioners' employ and engage in their own pursuits. Both girls claimed that Grand Island was their residence, one of them testifying that she boarded her child with a family in that city.

The primary issue before us is whether there was any evidence from which the jury could rightly find that petitioners transported the girls from Salt Lake City to Grand Island for an immoral purpose in violation of the Mann Act.

The penalties of Section 2 of the Act are directed at those who knowingly transport in interstate commerce "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice." The statute thus aims to penalize only those who use

interstate commerce with a view toward accomplishing the unlawful purposes. To constitute a violation of the Act, it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities. . . . An intention that the women or girls shall engage in the conduct outlawed by Section 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.

... Our examination of the record in this case convinces us that there was a complete lack of relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt, that petitioners transported the girls in interstate commerce "for the purpose of prostitution or debauchery" within the meaning of the Mann Act.

Speaking of the purpose sought to be accomplished by the Act, Mr. Justice MURPHY says:

... What Congress has outlawed by the Mann Act, however, is the use of interstate commerce as a calculated means for effectuating sexual immorality. In ordinary speech an interstate trip undertaken for an innocent vacation purpose constitutes the use of interstate commerce for that innocent purpose. Such a trip does not lose that meaning when viewed in light of a criminal statute outlawing interstate trips for immoral purposes.

In the light of that purpose the facts bearing on the intent of the defendants are discussed and it is said:

The fact that the two girls actually resumed their immoral practices after their return to Grand Island does not, standing alone, operate to inject a retroactive illegal purpose into the return trip to Grand Island. Nor does it justify an arbitrary splitting of the round trip into two parts so as to permit an inference that the purpose of the drive to Salt Lake City was innocent while the purpose of the homeward journey to Grand Island was criminal. The return journey under the circumstances of this case cannot be considered apart from its integral relation with the innocent round trip as a whole. There is no evidence of any change in the purpose of the trip during its course. If innocent when it began it remained so until it ended.

Closing the opinion, Mr. Justice MURPHY says:

... In short, we perceive no statutory purpose or language which prohibits petitioners under these circumstances from using interstate transportation for a vacation or for any other innocent purpose.

The CHIEF JUSTICE delivered a dissenting opinion in which Mr. Justice BLACK, Mr. Justice REED and Mr. Justice DOUGLAS joined. In it he said:

Courts have no more concern with the policy and wisdom of the Mann Act than of the Labor Relations Act or any other which Congress may constitutionally adopt. Those are matters for Congress to determine, not the courts. Congress, in enacting the Mann Act, declared in unmistakable terms that any person who should transport across state lines "any woman . . . for the purpose of prostitution . . . or with intent and purpose to induce . . . such woman to give herself to debauchery or to engage in any other immoral practice . . . shall be deemed guilty of a felony."

The fact that petitioners, who were engaged in an established business of operating a house of prostitution in Nebraska, took some of its women inmates on a transient and innocent vacation trip to other states, is in no way

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incompatible with the conclusion that petitioners, in bringing them back to Nebraska, purposed and intended that they should resume there the practice of commercial vice, which in fact they did promptly resume in petitioners' establishment. The record is without evidence that they engaged in, or intended to engage in, any other activities in Nebraska or that anything other than the practice of their profession was the object of their return. For this reason the case is controlled by *Lapina v. Williams*, 232 U. S. 78, rather than by *Hansen v. Haff*, 291 U. S. 559. The jury was properly instructed, its verdict is supported by ample evidence, and the two courts below rightly sustained it.

The case was argued by Mr. Eugene D. O'Sullivan for the Mortensens and by Mr. Robert L. Stern for the Government.

Federal Statutes—Second War Powers Act

Under Title III of the Second War Powers Act, the President is granted authority to ration material or facilities for defense or for private account or for export. The sole question in this case was whether under that Act the power of the President to allocate material included the power to issue suspension orders against retailers and to withhold rationed material from them when violation of the regulations is established. In such a case the statutory grant of authority is broad enough to include both rationing and withholding.

L. B. Stuart & Bro., Inc. v. Bowles et al., 88 L. ed. Adv. Ops. 985; 64 Sup. Ct. Rep. 1097; U. S. Law Week 4406. (No. 793, argued May 2, decided May 22, 1944).

Section 2 (a) (2) of Title III of the Second War Powers Act provides in part as follows:

Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

By §§ 2 (a) (8) of the Act the President is given authority to exercise that power through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe. That authority was delegated to the Office of Price Administration, which promulgated Ration Order No. 11 providing for the rationing of fuel oil. That order recited the now familiar facts concerning the then critical and acute shortage of fuel oil in the eastern states due to the great war activity. It stated that it was "essential to guarantee the continued availability of adequate supplies of fuel oil for military and naval use and for industrial and agricultural operations" and that the "reduction of demand to the available supply is sought to be achieved largely by a curtailment of the use of fuel oil for heating premises and for hot water," those two being the only uses which could be uniformly reduced without directly impeding the war effort. The order inaugurated a system of rationing control deemed necessary in order to "provide for equitable distribution of fuel oil in the areas of shortage." As part of the machinery for enforcement

of those objectives, provision was made for suspension orders as follows:

Any person who violates Ration Order No. 11 may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any fuel oil or other rationed product or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security.

A suspension order was thereafter issued against the Stuart Company, a retailer in fuel oil in the District of Columbia. It was found that this retailer had obtained large quantities of fuel oil from its supplier without surrendering ration coupons and that many thousands of gallons of fuel oil had been delivered to customers without receiving coupons in exchange. It was also found that proper records were not kept showing the transfers of fuel oil to customers. The order provided that Stuart furnish the Office of Price Administration with a list of consumers to whom it had sold oil from October, 1941, to October, 1942, and that it surrender all ration coupons in its possession. The order finally provided that "the Petroleum Administrator for War certify that the fuel needs for the District of Columbia could not be met by the supplies and the facilities of other suppliers and dealers and that it was therefore essential for the welfare of the community that the provisions of the suspension order be modified, the restrictions might be wholly or partly removed." The suspension order was issued after notice and hearings as provided in the regulations which govern the procedure in such cases.

The present suit was brought in the District Court for the District of Columbia to enjoin the enforcement of the suspension order. A temporary restraining order was issued. The Administrator moved for summary judgment. That motion was granted and the complaint was dismissed. On appeal to the Circuit Court of Appeals, the judgment was affirmed. The case was taken by the Supreme Court because of the importance of the problem in the administration of rationing regulations, and in that Court the judgment of the lower court was affirmed.

Mr. Justice DOUGLAS delivered the opinion of the Court and says:

The sole question presented by this case is whether the power of the President under § 2 (a) (2) of Title III of the Second War Powers Act to "allocate" materials includes the power to issue suspension orders against retailers and to withhold rationed materials from them where it is established they have acquired and distributed the rationed materials in violation of the ration regulations.

It was pointed out that the constitutional authority of Congress to authorize as a war emergency measure the allocation or rationing of materials is not challenged in this case. No question of delegation of authority was presented. The distributor conceded that the President had validly delegated to the Office of Price Ad-

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A suspension order was thereafter issued against the Steuart Company, a retailer in fuel oil in the District of Columbia. It was found that this retailer had obtained large quantities of fuel oil from its supplier without surrendering ration coupons and that many thousands of gallons of fuel oil had been delivered to customers without receiving coupons in exchange. It was also found that proper records were not kept showing the transfers of fuel oil to customers. The order provided that Steuart furnish the Office of Price Administration with a list of consumers to whom it had sold oil from October, 1941, to October, 1942, and that it surrender all ration coupons in its possession. The order finally provided that "the Petroleum Administrator for War certify that the fuel needs for the District of Columbia could not be met by the supplies and the facilities of other suppliers and dealers and that it was therefore essential for the welfare of the community that the provisions of the suspension order be modified, the restrictions might be wholly or partly removed." The suspension order was issued after notice and hearings as provided in the regulations which govern the procedure in such cases.

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Mr. Justice DOUGLAS delivered the opinion of the Court and says:

The sole question presented by this case is whether the power of the President under § 2(a) (2) of Title III of the Second War Powers Act to "allocate" materials includes the power to issue suspension orders against retailers and to withhold rationed materials from them where it is established they have acquired and distributed the rationed materials in violation of the ration regulations.

It was pointed out that the constitutional authority of Congress to authorize as a war emergency measure the allocation or rationing of materials is not challenged in this case. No question of delegation of authority was presented. The distributor conceded that the President had validly delegated to the Office of Price Ad-

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ministration whatever authority he has under Title III of the Act. No question was raised concerning the authority of Congress to delegate to the President the power to allocate materials. It was stated that the argument rather was that the authority to delegate material does not include the power to issue suspension orders and no such power will be implied unless the statute plainly imposes them.

As to these contentions, Mr. Justice DOUGLAS says:

We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. . . . Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record.

The problem of the scarcity of materials is often acute and critical in a great war effort such as the present one. Whether the difficulty be transportation or production, there is apt to be an insufficient supply to meet essential civilian needs after military and industrial requirements have been satisfied. Thus without rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. Allocation or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. The burdens are thus shared equally and limited supplies are utilized for the benefit of the greatest number. But middlemen—wholesalers and retailers—bent on defying the rationing system could raise havoc with it. By disregarding quotas prescribed for each householder and by giving some more than the allotted share they would defeat the objectives of rationing and destroy any program of allocation. These middlemen are the chief if not the only conduits between the source of limited supplies and the consumers. From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit. If the needs of consumers are to be met and the consumer allocations are to be filled, prudence might well dictate the avoidance or discard of such inefficient and unreliable means of distribution of a scarce and vital commodity. Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. That power of allocation or rationing might indeed be the only way of getting the right equipment to our armed forces in time. From the point of view of the factory owner from whom the materials were diverted the action would be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business. Yet if the President has the power to channel raw materials into the most efficient industrial units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil.

* * *

. . . These violations were obviously germane to the problem of allocation of fuel oil. For they indicated that a scarce and vital commodity was being distributed in an inefficient, inequitable and wasteful way. The character of

the violations thus negatives the charge that the suspension order was designed to punish petitioner rather than to protect the distribution system and the interests of conservation.

Coming to the last objection raised by the distributor, Mr. Justice DOUGLAS says:

It is finally pointed out that Congress has seldom used the licensing power and that that power, when used, has been employed sparingly. Thus one of the sanctions of the Emergency Price Control Act of 1942 . . . is the power to revoke licenses for violations of maximum prices or rents. . . . That power may be utilized only in judicial proceedings; and licenses may be suspended only for limited periods. . . . That consideration would be germane to the present problem if Congress had implemented the allocation procedure with a licensing system. Then the question might arise whether revocation of the license rather than the reallocation of materials by administrative action was the appropriate procedure in case of violations. Congress, however, did not adopt the licensing system when it came to rationing. And the failure to do so is hardly a reason for saying that the power to "allocate" is less replete than a reading of the Act fairly permits.

The case was argued by Mr. Renah F. Camalier for Steuart and by Mr. Thomas I. Emerson for OPA.

Taxation—Interstate Commerce—Sales Tax

Sales to Arkansas purchasers made by a Tennessee corporation may not constitutionally be subjected to an Arkansas sales tax where the seller has no place of business in Arkansas, orders are accepted in Tennessee and passage of title and collection of sales price takes place outside of Arkansas.

McLeod, Commissioner, v. J. E. Dilworth Company and Reichman-Crosby Company, 88 L. ed. Adv. Ops. 910; 64 Sup. Ct. Rep. 1023; U. S. Law Week 4378. (No. 311, argued February 4, decided May 15, 1944).

The respondents, Tennessee corporations, with their principal places of business in Memphis and not qualified to do business in Arkansas and having neither sales offices, branch plant, nor any other place of business in Arkansas, solicited orders in Arkansas through traveling salesmen or by mail or telephone. All orders were required to be accepted by the Memphis offices and goods were shipped from Tennessee. Title passed upon delivery to the carrier in Tennessee and collection of the sales price was not made in Arkansas. The State of Arkansas imposed a tax described by the Arkansas Supreme Court as being a retail sales tax and not a use tax. The Supreme Court of Arkansas had held in 1939 with reference to a similar previous tax (*Mann v. McCarroll*, 198 Ark. 628) that Arkansas had no power to exact a sales tax upon sales effected in the manner set forth above and when the present case came before it involving a new 1941 statute, the Arkansas Supreme Court held that its prior decision was controlling and that there was nothing in the United States Supreme Court's intervening decision in *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, requiring a change in its previous opinion as to the invalidity of the tax.

In an opinion by Mr. Justice FRANKFURTER, the Supreme Court affirms the judgment of the Arkansas

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Supreme Court and holds that the *Berwind-White* case presented a different situation with the distinguishing point between the case at bar and the *Berwind-White* case being the fact that in the later case the corporation maintained a sales office in New York City, took its contracts in New York City and made actual delivery in New York City. In further distinguishing the *Berwind-White* case from the instant case, Mr. Justice FRANKFURTER said:

... In *Berwind-White* the Pennsylvania seller completed his sales in New York; and in this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction.

In response to the argument made on behalf of Arkansas that the state could have levied a tax of the same amount on the use of these goods in Arkansas by Arkansas buyers and that such a use tax would be constitutionally valid, the majority opinion states:

... Whatever might be the fate of such a tax were it before us, the not too short answer is that Arkansas has chosen not to impose such a use tax, as its Supreme Court so emphatically found. A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences between these transactions and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a state which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several states. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the states.

Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a state.

A dissenting opinion was written by Mr. Justice DOUGLAS in which Mr. Justice BLACK and Mr. Justice MURPHY concurred. The basis of the dissent is that the majority's decision draws a distinction between the use tax and the sales tax which the dissent considers irrelevant to the power of Arkansas to tax. It is further stated that the majority opinion is squarely opposed to the Supreme Court's prior decision in *McGoldrick v. Felt & Tarrant Co.*, 309 U. S. 70, wherein the Supreme Court had upheld the collection of a sales tax on sales made to New York purchasers pursuant to orders accepted outside of the state, with payment of the sales price being made direct to the non-resident seller. The dissenting opinion points out that the economic incidence of a use tax and a sales tax applied at the end of an interstate transaction are the same and that their

effect upon interstate commerce is identical. Mr. Justice DOUGLAS states:

... In terms of state power, receipt of goods within the state of the buyer is as adequate a basis for the exercise of the taxing power as use within the state. And there should be no difference in result under the Commerce Clause where, as here, the practical impact on the interstate transaction is the same.

It is no answer to say that the Arkansas sales tax may not be imposed because the out-of-state seller was "through selling" when the tax was incurred. That was likewise true of both the use tax cases, including *General Trading Co. v. State Tax Commission*, decided this day, and the sales tax decision in *McGoldrick v. Felt & Tarrant Co.* The question is whether there is a phase of the interstate transaction on which the state of the buyer can lay hold without placing interstate commerce at a disadvantage. There is no showing that Tennessee was exacting from these vendors a tax on these same transactions or that Arkansas discriminated against them.

A separate dissenting opinion was written by Mr. Justice RUTLEDGE.

The case was argued by Mr. Leffel Gentry for the Arkansas Commissioner of Revenues and by Messrs. J. Fred Brown and W. H. Daggett for the taxpayers.

Taxation—Constitutionality of Personal Property Tax upon Airplane Fleet in Interstate Commerce

A personal property tax upon the entire value of an airplane fleet may be imposed by the state in which the airline is incorporated and in which it has its principal place of business, even though the planes are continuously engaged in interstate commerce.

Northwest Airlines, Inc. v. State of Minnesota, 88 L. ed. Adv. Ops. 956; 64 Sup. Ct. Rep. 950; U. S. Law Week 4370. (No. 33, argued October 19 and 20, 1943, decided May 15, 1944).

This is a suit testing the validity of the Minnesota personal property tax upon the entire fleet of airplanes owned by the petitioner and operated by it in interstate transportation. The petitioner was a Minnesota corporation with its principal place of business in that state. It carried persons, property, and mail on regular fixed routes within seven states. For all its planes, St. Paul, Minnesota, was the home port registered with the Civil Aeronautics Authority. It operated maintenance bases at six of its scheduled cities in different states, but the work of rebuilding and overhauling the planes was done in St. Paul. All of its planes were in Minnesota from time to time during the taxable year. All were, however, continuously engaged in flying from state to state, except when laid up for repairs and overhauling. On the date fixed for assessment, its scheduled route mileage in Minnesota was 14% of its total scheduled route mileage, and its scheduled plane mileage was 16% of that scheduled. It based its tax on the number of planes in Minnesota on that date. Thereupon the taxing authorities assessed a tax on the basis of the entire fleet. The Supreme Court of Minnesota upheld the tax.

On a challenge of the tax under the commerce clause and under the due process clause of the Fourteenth Amendment, the decision was affirmed. Mr. Justice

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FRANKFURTER announced the conclusion and judgment of the Court. Mr. Justice BLACK and Mr. Justice JACKSON concurred in separate opinions. The CHIEF JUSTICE, joined by Mr. Justice ROBERTS, Mr. Justice REED, and Mr. Justice RUTLEDGE, dissented.

In Mr. Justice FRANKFURTER's opinion the tax was sustained on the ground that Minnesota was both the state of incorporation and the corporation's principal place of business:

Minnesota is here taxing a corporation for all its property within the state during the tax year no part of which receives permanent protection from any other state. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the "home port" of all its planes. The relation between Northwest and Minnesota—a relation existing between no other state and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. . . . No other state can claim to tax as the state of the legal domicile as well as the home state of the fleet, as a business fact. No other state is the state which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other state could impose a tax that derives from the significant legal relation of creator and creature and the practical consequences of that relation in this case. On the basis of rights which only Minnesota originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other state. It is too late to suggest that this taxing power of a state is less because the tax may be reflected in the cost of transportation.

This opinion rejects the doctrine of apportionment, and apparently leaves open the question of the right of other states to impose a tax upon some proportion of the value of the fleet. The only limitation upon the taxing power of the domiciliary state is with respect to property "continuously without the state during the whole tax year." If no part of the property has acquired a permanent location (taxing situs) elsewhere, the domiciliary state may tax the entire property.

To introduce a new doctrine of tax apportionment as a limitation upon the hitherto established taxing power of the home state is not merely to indulge in constitutional innovation. It is to introduce practical dislocation into the established taxing systems of the states. The doctrine of tax apportionment has been painfully evolved in working out the financial relations between the states and interstate transportation and communication conducted on land and thereby forming a part of the organic life of these states. Although a part of the taxing systems of this country, the rule of apportionment is beset with friction, waste and difficulties, but at all events it grew out of, and has established itself in regard to, land commerce. To what extent it should be carried over to the totally new problems presented by the very different modes of transportation and communication that the airplane and the radio have already introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises questions that we ought not to anticipate; certainly we ought not to embarrass the future

by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship.

The opinion expressly refused to consider the effect of the power of Congress to control the taxation of interstate airplane transportation.

Mr. Justice BLACK, in his concurring opinion, apparently felt that the opinion of Mr. Justice FRANKFURTER restricted the taxation of the corporation's property by other states:

I concur in the judgment of the Court and in substantially all that is said in the opinion, but I would not in this case foreclose consideration of the taxing rights of states other than Minnesota.

I believe there is small support in reason or in the Constitution for the doctrine that the Commerce Clause in and of itself prohibits a state from applying its general tax laws to transactions and properties in interstate commerce unless it is able to make two correct prophecies as to what this Court ultimately may hold, namely, [1] The permissible total of taxes which might be imposed by an aggregate of states on the taxed properties or transactions; and [2] The proportion of this total which the state itself fairly may claim. . . . Extension of this dubious doctrine to the new problems of air transport gives promise of little but tax confusion.

The differing views of members of the Court in this and related cases illustrate the difficulties inherent in the judicial formulation of general rules to meet the national problems arising from state taxation which bears in incidence upon interstate commerce. These problems, it seems to me, call for Congressional investigation, consideration, and action. The Constitution gives that branch of government the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution.

Mr. Justice JACKSON, on the other hand, apparently interpreted Mr. Justice FRANKFURTER's opinion as still permitting taxation by other states:

. . . I do not accept the opinion because it falls short of commitment that Minnesota's right is exclusive of any similar right elsewhere. It is, I know, difficult to judge and dangerous to foreclose claims of other states that are not before us. That is the weakness of the judicial process in these tax questions where the total problem that faces an industry reaches us only in installments. If the reasoning should hereafter be extended to support full taxation everywhere, it would offend the commerce clause, as I see it, even more seriously than apportioned taxation everywhere.

The evils of local taxation of goods or vehicles in transit are not measured by the exaction of one locality alone, but by the aggregation of them. I certainly do not favor exemption of interstate commerce from its "just share of taxation." But history shows that fair judgment as to what exactions are just to the passerby cannot be left to local opinion. When local authority is taxing its own, the taxed ones may be assumed to be able to protect themselves at the polls. No such sanction enforces fair dealing to the transient. In all ages and climes those who are settled in strategic localities have made the moving world pay dearly. This the commerce clause was designed to end in the United States.

In Mr. Justice JACKSON's opinion, the Minnesota tax should be sustained, not on the basis of domicile, but on the basis of the "home port" theory which had

been applied to steamship navigation before the introduction of federal legislation. The opinion strongly invites federal legislation in the field of air commerce to assist in the problem of multiple taxation.

The dissenting opinion holds that the tax violates the commerce clause, because it results in multiple taxation of property in interstate commerce. This opinion points out that "the constitutional basis for the state taxation of the airplanes, which are chattels, is their physical presence within the taxing state, and not the domicile of the owner":

... In this respect, as this Court has often pointed out, the taxation of chattels rests on a different basis than does the taxation of intangibles, which have no physical situs and may be reached by the tax gatherer only through exertion of the power of the state over the person of those who have some legal interest in the intangibles.

A state may, within the Fourteenth Amendment, tax a chattel located within its limits, although its owner is domiciled elsewhere, . . . but due process precludes the state of the domicile from taxing it unless it is brought within that state's boundaries. . . . It is plain then that for present purposes, and so far as the Fourteenth Amendment is concerned, respondent's airplanes, which are chattels regularly moving over fixed interstate routes, are subject in some measure to the taxing power of every state in which they regularly stop on their interstate mission.

Admitting that domicile may have some relevance to the taxing power of tangibles under the due process clause, the dissent holds that it has no effect upon the reasonableness of the tax burden under the commerce clause. The opinion rejects also the "place of business" and "home port" theories in support of the tax, and points out the practical difficulty of applying such theories to air commerce. On the evidence, it rejects also the finding that the airplanes had no taxable situs in other states. It holds that some reasonable formula of apportionment is required in order to prevent taxation which is "obviously disproportionate to the protection afforded to the taxed property."

The case was argued by Mr. Michael J. Doherty for Northwest Airlines, Inc., and by Mr. Andrew R. Bratter and Mr. George B. Sjoselius for the State of Minnesota.

Taxation—Interstate Commerce—Use Tax

A Minnesota corporation selling to Iowa purchasers may constitutionally be required to collect the Iowa use tax on such sales although the Minnesota corporation has not qualified to do business in Iowa, maintains no place of business there, and orders are accepted and goods shipped outside of Iowa.

General Trading Company v. State Tax Commission of the State of Iowa, 88 L. ed. Adv. Ops. 914; 64 Sup. Ct. Rep. 1028; U. S. Law Week 4380. (No. 441, argued February 4, decided May 15, 1944).

The Iowa Tax Commission sued to collect the use tax imposed on the use in Iowa of tangible personal property purchased for use in the state. The tax was imposed upon persons using such property and was required to be collected from purchasers by "every retailer maintaining a place of business" in Iowa. General

Trading Corporation, the selling corporation, was organized in Minnesota, had not qualified to do business in Iowa and did not maintain any office or place of business in Iowa. Orders were obtained through salesmen sent into Iowa and were subject to acceptance in Minnesota. Goods were shipped to Iowa by mail or common carriers. The Iowa Supreme Court found that General Trading Corporation was "a retailer maintaining a place of business" in Iowa within the statute, and held that Iowa had power to impose the use tax on Iowa purchasers and that collection could validly be made through the selling corporation. Certiorari was granted in response to the claim that there was need for further clarification of the Supreme Court's previous rulings. (*Nelson v. Sears Roebuck & Co.*, 312 U. S. 373; *Nelson v. Montgomery Ward*, 312 U. S. 373) on the power of states to levy use taxes.

The Supreme Court, in an opinion by Mr. Justice FRANKFURTER, affirms the judgment of the Supreme Court of Iowa upholding the tax and its collection through the foreign seller. In the view of the Court its previous decision in the *Sears Roebuck* and *Montgomery Ward* cases are controlling as to the validity of the tax.

... the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the state. All these differentiations are without constitutional significance.

• • •

... the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which it may draw from a state to the upkeep of which it may be asked to bear its fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce.

• • •

The tax is what it professes to be—a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government.

With respect to the fact that a selling corporation engaged in interstate commerce was required to collect the tax from the purchaser the Court said merely:

To make the distributor the tax collector for the state is a familiar and sanctioned device.

A separate concurring opinion was written by Mr. Justice RUTLEDGE.

Mr. Justice JACKSON writes a dissenting opinion which is joined in by Mr. Justice ROBERTS. Mr. Justice JACKSON recognizes that the Supreme Court has held in the *Monamotor Oil Co.* and *Felt & Tarrant Mfg. Co.* cases that a state may make tax collectors of those who come in and do business within its jurisdiction but he views

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the majority opinion as holding that a state has power to make a tax collector of one whom, under the Court's decision in *McLeod v. Dilworth Co.*, decided the same day, it has no power to tax for purposes of a sales tax under like circumstances as those involved in the instant case. Mr. Justice JACKSON says in conclusion—

... I can think of nothing in or out of the Constitution which warrants this effort to reach beyond the state's own border to make out-of-state merchants tax collectors because they engage in interstate commerce with the state's citizens.

The case was argued by Mr. Edward S. Stringer for General Trading Company and by Mr. Jens Grothe for State Tax Commission of Iowa.

Taxation—Interstate Commerce—Gross Income Tax

A foreign corporation may be subjected by Indiana to gross income tax upon sales made by branches both inside and outside of Indiana to customers residing both inside and outside of Indiana where delivery is made in Indiana; sales by Indiana branches to customers residing in Indiana where goods are shipped from outside Indiana are also held includible in tax computation.

International Harvester Company and International Harvester Company of America v. Department of Treasury of the State of Indiana, 88 L. ed. Adv. Ops. 905; 64 Sup. Ct. Rep. 1019; U. S. Law Week 4367 (No. 355, argued February 29, decided May 15, 1944).

The constitutionality of the imposition by Indiana of its gross income tax upon the appellant corporations was at issue in this case. The taxpayer corporations were authorized to do business in Indiana but were incorporated in other states. They maintained manufacturing plants and selling branches in Indiana as well as other states. The transactions which the Indiana Supreme Court held might properly be subjected to its gross income tax fall into three descriptive categories:

(1) Sales by outside of Indiana branches to Indiana dealers and users where the orders were solicited in Indiana and the buyers took delivery at Indiana factories.

(2) Sales by Indiana branches to outside of Indiana dealers and users where the buyers came to Indiana and accepted delivery there.

(3) Sales by Indiana branches to Indiana dealers and users in which the goods were shipped from outside of Indiana to the buyers.

In the case of sales by the Indiana branches, orders and contracts were accepted in Indiana and payment was made there, but in the case of sales by branches outside of Indiana, acceptance and payment took place outside the state. In a previous case, *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, the Supreme Court had held that the commerce clause barred the imposition by Indiana of its gross income tax on gross receipts from sales made by an Indiana manufacturing corporation which sold its products to buyers in other states and countries upon orders taken subject to approval of the Indiana office. In *Department of Treasury v. Wood*

Preserving Corp., 313 U. S. 62, the Court had held, however, that Indiana might constitutionally tax receipts from sales by a Delaware corporation which obtained goods from Indiana producers and delivered them to the buyer in Indiana who immediately shipped them out of Indiana with contracts and payment being made outside of Indiana. In the present case also, the Supreme Court holds that Indiana has the right to include the three types of sale transactions described above in the computation of its gross income tax.

Mr. Justice DOUGLAS delivered the opinion of the Court. He finds that the sales in the *Wood Preserving Corp.* case are not distinguishable from those involved in the first category in the present case:

... Here as in the *Wood Preserving Corp.* case, delivery of the goods in Indiana is an adequate taxable event. When Indiana lays hold of that transaction and levies a tax on the receipts which accrue from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. These sales, moreover, are sales of Indiana goods to Indiana purchasers. While the contracts were made outside the state, the goods were neither just completing nor just starting an interstate journey.

Likewise the *Wood Preserving Corp.* case is held conclusive of the taxability of the second class of sale transactions at issue, sales by an Indiana branch to an out-of-state buyer who takes delivery in Indiana and transports the goods out of the state. Mr. Justice DOUGLAS says:

... The *Wood Preserving Corp.* case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and the delivery took place in Indiana. Those events would be adequate to sustain a sales tax by Indiana.

The taxation of the receipts from the final group of sales, wherein Indiana branches sold to Indiana buyers with the goods being shipped from outside of Indiana to the buyers, was upheld on the authority of *Department of Treasury v. Allied Mills, Inc.*, 318 U. S. 740 (Indiana gross income tax), *Felt & Tarrant Co. v. Gallagher*, 306 U. S. 62 (California use tax), and *McGoldrick v. Felt & Tarrant Co.*, 309 U. S. 70 (New York City sales tax). The opinion states:

Indeed the transactions... have fewer interstate attributes than those in the *Felt & Tarrant Co.* cases since the agreements to sell were made in Indiana, both buyer and seller were in Indiana, and payments were made in Indiana.... In this case... the taxable transaction is at the final stage of an interstate movement and the tax is on the gross receipts from an interstate transaction.... In light of our recent decisions it could hardly be held that Indiana lacked constitutional authority to impose a sales tax or a use tax on these transactions. But if that is true, a constitutional difference is not apparent when a "gross receipts" tax is utilized instead.

Here as in case of the other classes of sales there is no discrimination against interstate commerce. The consummation of the transaction was an event within the borders of Indiana which gave it authority to levy the tax on the gross receipts from the sales. And that event was distinct

from the interstate movement of the goods and took place after the interstate journey ended.

The taxpayer corporations pointed out in their argument that in all probability some of the sales here involved would also be included in the computation and imposition upon them of the Illinois retailers' occupation tax and that double taxation was, therefore, threatened. As to this argument, Mr. Justice DOUGLAS says:

... it will be time to cross that bridge when we come to it. ... We only hold that where a state seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such "local activities or privileges" ... are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage.

Mr. Justice RUTLEDGE wrote a separate concurring opinion. Mr. Justice JACKSON dissented without opinion.

The case was argued by Messrs. Edward R. Lewis and Joseph J. Daniels for the taxpayer corporations and by Messrs. Winslow Van Horne and John J. McShane for Indiana Treasury Department.

Interstate Commerce Act—Regulation of Rates—Relation Between Interstate Commerce Act and Emergency Legislation Against Inflation

In the exercise of its rate-making power under the Interstate Commerce Act, the Interstate Commerce Commission has a wide discretion in ruling on a petition for rehearing, asserting that a change in economic conditions requires a modification of a recent rate order of the Commission. Denial by the Commission of a petition for rehearing will not be set aside by the courts on review except upon a clear showing of abuse of discretion, which is not found in this case.

The Price Administrator and the Director of Stabilization were permitted to intervene, under the requirements of the Inflation Control Act of 1942, but it is held that upon their intervention they have no standing superior to that of other intervenors under the Commission's applicable rules of practice. The weight and effect to be accorded the Price Administrator's contentions are for determination by the Commission rather than by the courts.

Interstate Commerce Commission, et al., v. Jersey City, et al., 88 L. ed. Adv. Ops. 1064; 64 Sup. Ct. Rep. 1129; U. S. Law Week 4415 (No. 767, argued May 2 and 3, decided May 29, 1944).

On this direct appeal from the federal District Court in New Jersey, the Supreme Court had before it the validity of an order of the Interstate Commerce Commission allowing the Hudson and Manhattan Railroad to increase the fare on its downtown line. Since 1937 the Company has been endeavoring to establish a 10-cent fare on that line but, by order of the Commission, an 8-cent fare was made effective in 1938. In June, 1942, the railroad, alleging changed conditions and increased costs, again applied for a 10-cent fare. The Commission held extensive hearings at which the Price Administrator appeared. The hearings were concluded in September, 1942.

The following month the Inflation Control Act was passed. It contains a proviso that "no common carrier

or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the federal, state or municipal authority having jurisdiction to consider such increase." Thereafter, the Price Administrator was permitted to file a brief in which he opposed any increase in rates. The trial examiner recommended that the Commission find the downtown rate to be just and reasonable at ten cents. Further proceedings were had, on exceptions, and the Commission fixed the rate at 9 cents. The railroad then petitioned for reconsideration, stating, among other things, that it could not avail itself of the 9-cent rate because its collection boxes could not handle the volume of coins that would be involved, and that under war conditions they could not be replaced. It sought to charge a 10-cent fare until it could secure tokens. Jersey City opposed (as it had throughout the proceedings) and the Price Administrator also answered suggesting a scheme for collecting the 9-cent fare through the use of paper tickets. Finally the Commission issued a report authorizing an alternative basis of 11 tokens for \$1.00 or a cash fare of 10 cents, upon condition that the same alternative basis be put into effect on the uptown line.

The order was attacked in a specially constituted court of three judges. It invalidated the Commission's order. On appeal the ruling of the District Court was reversed and the order of the Commission was sustained in an opinion by Mr. Justice JACKSON.

The opinion outlines in considerable detail the proceedings before the Commission and the care with which it had considered the case. Two legal questions are passed on by the Supreme Court—one, as to whether the Commission failed to give a full and fair hearing in view of its refusal to reopen the whole case to receive evidence relating to 1943 earnings; and the other, involving effect of the emergency legislation.

The opinion observes that the first question, though important, is not a new one. After citing various rulings on questions of this character, the Commission's ruling is found to be within its discretion and is sustained.

As to the effect of the emergency legislation, the opinion stresses that Congress was free to apportion the functions of the federal agencies as it saw fit and that, although it could have subjected the Commission's rulings on rate questions to review or veto, it has not in fact done so. And the record is reviewed to show that the Commission did not ignore the Price Administrator's charge as to the inflationary effect of the rate increase. In conclusion the view is taken that the weight to be given to the Price Administrator's contentions is for the Commission to determine rather than for the courts. Mr. Justice JACKSON says:

The Interstate Commerce Commission has responsibility for maintaining an adequate system of wartime transporta-

tion. It is without power to protect these essential transportation agencies from rising labor and material costs. It can decide only how such unavoidable costs shall be met. They can in whole or in part be charged to increased fares, or they can be allowed to result in defaults and receiverships and reorganizations, or they may be offset by inadequate service or delayed maintenance. All of these considerations must be weighed by the Commission with wartime transportation needs as well as avoiding inflationary tendencies as a public responsibility. The need for informed, expert and unbiased judgment is apparent. The problem is intricate, the carrier is one of peculiar characteristics, its wartime traffic is of varying density, with peaks and rush hours, the rates and carrying capacities of competitors by bus and ferry are involved in any estimate of traffic diversions or probable effects of rates. What rates are required to meet actual and proper operating expenses, what revenue must be available to avoid defaults and sustain credit, what divisions should be made on interchanged traffic are as complex problems in rate-making as can readily be imagined. The delicacy of the Commission's task in wartime is no reason for allowing greater scope to judicial review than we are willing to exercise in peacetime. We think the weight to be given to the Price Administrator's contentions was for the Commission, not the court, to determine. The scope of proper judicial review does not expand or contract, depending on what party invokes it. It is as narrow now as it was when appealed to by the Company. . . . If Congress desires to grant its own agencies greater privileges of judicial review than have been allowed to private parties it is at liberty to do so, but it is not for the Court to set aside, without legislative command, its slow-wrought general principles which protect the finality and integrity of decisions by administrative tribunals.

Mr. Justice DOUGLAS delivered a separate opinion, stating that he would decide the case differently. He refers to his dissents as expressed in *Vinson v. Washington Gas Light Company*, 321 U. S. — and *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, saying that he would overrule those decisions.

Mr. Justice MURPHY joins in the opinion of Mr. Justice DOUGLAS.

Mr. Justice BLACK did not participate.

The case was argued by Mr. John F. Finerty for the Hudson & Manhattan Railroad Company, by Mr. Edward M. Reidy for the Interstate Commerce Commission, by Mr. Charles Hershenstein for the City of Jersey City, and by Mr. David F. Cavers for the Economic Stabilization Director.

Taxation—Constitutionality of Tax upon Dividend Paid by Foreign Corporation to Non-resident Stockholders

A state tax on dividends paid by a foreign corporation with respect to surplus attributable to income earned in the state is not unconstitutional, even when paid outside the state to non-resident stockholders.

International Harvester Co. v. Wisconsin Dept. of Taxation, 88 L. ed. Adv. Ops. 1023; 64 Sup. Ct. Rep. 1060; U. S. Law Week 4428. (Nos. 620, 621, argued April 27, decided May 29, 1944).

This is an appeal under the Fourteenth Amendment by a New Jersey and a Delaware corporation from a judgment of the Supreme Court of Wisconsin sustain-

ing assessments of the Wisconsin "privilege dividend" tax. The tax is imposed with respect to both foreign and domestic corporations doing business within the state "for the privilege of declaring and receiving dividends" out of income derived from property located and business transacted in the state. The payor corporation is required to deduct the tax from the dividends payable to both resident and non-resident stockholders. In the case of each corporation, the tax as assessed was measured by so much of the dividends as were derived from the portion of the corporate surplus attributed by the tax authorities to income earned by the corporation in Wisconsin. The dividends were declared at directors' meetings held outside the state, and the dividend checks were drawn on bank accounts outside the state.

The same tax was sustained against a similar challenge in the celebrated case of *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435. The holding of that case was thus summarized in the present case:

In the *Penney* case we sustained the tax in the case of a Delaware corporation doing business in Wisconsin, but having its principal office in New York, holding its meetings and voting its dividends there, and drawing its dividend checks on New York bank accounts. In considering the incidence of the tax in Wisconsin, which could afford a basis for the taxation there although the declaration and payment of the dividend took place outside the state, this Court pointed out that the practical operation of the tax is to impose an additional tax on corporate earnings within Wisconsin, but to postpone the liability for payment of the tax until such earnings are paid out in dividends, and we added, 311 U. S. at p. 442: "In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out."

The present challenge was primarily based upon a decision of the Wisconsin Supreme Court that, for the purpose of the state income tax, no deduction is allowable to the payor corporation on account of the dividend tax, for the reason that the tax is imposed upon the shareholders. (For a similar holding under the federal income tax, see *Wisconsin Gas and Electric Co. v. United States*, decided the same day by the Supreme Court reviewed at p. 430 *infra*). The further argument was made that the tax violates the Fourteenth Amendment because retroactively applied to and measured by Wisconsin income which was earned and carried to the taxpayers' surplus accounts before the enactment of the statute.

The tax was sustained in an opinion by the CHIEF JUSTICE. The Court first concluded that the corporations had standing to contest the tax. It then held that the characterization of the tax as a levy upon the privilege of declaring and receiving dividends was not controlling.

Nor do we perceive any constitutional obstacle either to the state's distributing the burden of the tax ratably among the stockholders, as the ultimate beneficiaries of the corporation's activities within the state, and of the state's relinquishment of control over the Wisconsin

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earnings, so as to render the tax *pro tanto* one on the stockholders' income, or to the state's imposing on the corporation the duty of acting as its agent for the collection of the tax, by requiring deduction of the tax from earnings distributed as dividends.

The power to tax the corporation's earnings includes the power to postpone the tax until the distribution of those earnings, and to measure it by the amounts distributed. . . . In taxing such distributions, Wisconsin may impose the burden of the tax either upon the corporation or upon the stockholders who derive the ultimate benefits from the corporation's Wisconsin activities. Personal presence within the state of the stockholder-taxpayer is not essential to the constitutional levy of a tax taken out of so much of the corporation's Wisconsin earnings as is distributed to them. A state may tax such part of the income of a non-resident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers. . . . And the privilege of receiving dividends derived from corporate activities within the state can have no greater immunity than the privilege of receiving any other income from sources located there.

We think that Wisconsin may constitutionally tax the Wisconsin earnings distributed as dividends to the stockholders. It has afforded protection and benefits to appellants' corporate activities and transactions within the state. These activities have given rise to the dividend income of appellants' stockholders and this income fairly measures the benefits they have derived from these Wisconsin activities. There is no contention here that the formula of apportionment does not fairly reflect the proper proportion of appellants' earnings attributable to their Wisconsin activities and transactions. Wisconsin may impose a measure of control upon the corporation there with respect to its withdrawal of its earnings from the state, and also may, for the protection of the interests of the state and of its citizens, regulate to some extent the declaration and distribution of dividends by a foreign corporation, certainly with respect to its Wisconsin earnings. . . . The earnings in Wisconsin, their withdrawal from Wisconsin and their distribution in the form of dividends have resulted in the receipt of income by the stockholder-taxpayers and it is Wisconsin's relation to all which permits it to levy the tax. It may condition the privilege of earning and disposing of the Wisconsin earnings upon the payment of a tax measured by and collected from the earnings to be distributed as dividends.

"The facts that Wisconsin cannot prevent the withdrawal of the earnings from the state or the declaration of the dividends, if they be the facts, have no bearing on its right to measure, in terms of taxes, both the benefits which it has conferred on the stockholders in their relations with the state, and the activities or transactions which are within the reach of its regulatory power.

On the question of retroactivity, it was held sufficient that the taxable event, the distribution of a dividend, occurred after the enactment of the statute.

Mr. Justice JACKSON dissented on the ground that the tax is imposed upon non-resident shareholders, not upon income earned by the corporation within the state. Since the taxable event is the distribution, it can not be said that the subject of the tax is the income there-

fore earned; the distribution is not "income," but capital "outgo."

These dividends of course are income to the stockholder, and any state with jurisdiction to tax him may tax them as such. But I am unable to agree that having "afforded protection and benefits" to a corporation gives jurisdiction to tax the incomes of all its stockholders. Nor do I think that because the state has once permitted the corporation to do business and make earnings in the state its taxing power follows those earnings into the hands of third persons to whom they may be paid. A dividend when declared becomes a debt of the corporation, enforceable as any other debt. If there is power in Wisconsin, because funds were earned there, to tax the receipt of a dividend, there is no reason why it should not also have power to tax the recipients of corporate funds as wages, salaries, or as payment of any other obligation.

Moreover, the Court itself apparently feels obliged to abandon the income-tax-on-the-corporation theory in order to avoid the objection of retroactivity. In considering this aspect of the tax it shifts to a "taxable event" theory which places the event after the enactment of the statute.

The dissent pointed out also that the tax, if imposed upon the corporation, would be a burden upon the equity stockholders; whereas here it creates a violation of the corporate charter by allocating part of the burden to preferred stockholders. The dissent questions also the majority's finding of "a measure of control" by Wisconsin with respect to the withdrawal of the dividends. The opinion concludes:

It is impossible to reconcile the taxable-event theory with the benefit theory for supporting this tax. The taxable event clearly is the payment of the dividend. The right to make such payment is not derived from Wisconsin law. The ability to do so does not depend on Wisconsin earnings. The existence of earnings for the period, or of an accumulated surplus, from Wisconsin earnings alone would not authorize such a dividend. That would depend on net accumulations from all sources and surplus from Wisconsin might be neutralized by losses from operations elsewhere. In such a case it is clear this statute would not even purport to tax, although Wisconsin had extended exactly the same protection to the operations within the state as otherwise. Moreover, if earnings were had in Wisconsin and there were net earnings over-all but the corporation should decide to accumulate them, the statute would not purport to lay the Wisconsin tax. These facts make clear that Wisconsin is doing what the Supreme Court of Wisconsin said it was doing. It lays a tax upon the stockholder's dividend. It does not tax the income of the corporation.

I do not see that the way to tax the dividends of non-resident stockholders can be bridged by "some practically effective device" necessary "in order to enable the state to collect its tax—here by imposing on the corporation the duty to withhold the tax." Do we mean that the state may empower or obligate a foreign corporation to collect for it taxes it is without power to collect itself? The physical power to get the money does not seem to me a test of the right to tax. Might does not make right even in taxation. To hold that what the use of official authority may get the state may keep, and that if it cannot get hold of a non-resident stockholder it may hold the company as hostage for him, is strange constitutional doctrine to me.

Whatever rights Wisconsin has to reach beyond its

borders and tax non-residents every other state has also. One who puts his savings to work in an enterprise of national scope may be subjected to any number of state taxes on his dividends up to forty-eight. Any number up to forty-seven of them may be levied by states in which he never lived, never went, did no individual business, and has no vote. Representation is the ordinary guaranty of fairness in taxation.

I do not think any fact in this case shows jurisdiction in Wisconsin to lay a tax on a privilege she does not grant and could not deny, which is exercised wholly outside of her borders and by those who are not her citizens or her corporate creatures. I see no foundation for the tax Wisconsin has laid and no better foundation for the substitute tax this Court has laid.

The case was argued by Mr. Ray M. Stroud and Mr. Edward R. Lewis for Harvester Company and by Mr. G. Burgess Ela for Minnesota Mining Company and by Mr. Harold H. Persons for the Wisconsin Taxation Department.

Interstate Commerce—Sherman Anti-Trust Act—Fire Insurance— Interstate Commerce

Fire insurance business through an underwriters' association with a membership of nearly three hundred companies controlling ninety per cent of the fire insurance, in six states, in which rates for the member companies are fixed and its business regulated, and which requires the use of the facilities of interstate commerce across the lines of nearly every state in the Union, is interstate commerce and is within the scope and purpose of the Sherman Act. Authority to enforce the provisions of that Act is properly derived from the Interstate Commerce Clause.

U. S. v. South-Eastern Underwriters Assn., 88 L. ed. Adv. Ops. 1082; 64 Sup. Ct. Rep. 1162; U. S. Law Week 4451. (No. 354, argued January 11, decided June 5, 1944.)

The South-Eastern Underwriters Association and its membership of nearly 200 private stock fire insurance companies and certain individuals were indicted in the District of Columbia for violation of the Sherman Anti-Trust Act. The indictment alleged two conspiracies. The first, in violation of § 1 of the Act, was to restrain interstate trade and commerce by fixing and maintaining arbitrary and non-competitive premium rates on fire insurance in Alabama, Florida, Georgia, North Carolina, South Carolina and Virginia. The second, in violation of § 2, was to monopolize trade and commerce in the fire insurance business and in and among the same states. The indictment charged that the member companies control ninety per cent of the rates for fire insurance sold by fire insurance companies in the six states where the conspiracies were consummated. Both conspiracies consisted of a continuing agreement and concert of action effectuated through the Association. In addition to the conspirators' control of premium rates and agents' commissions, boycotts and other types of coercion and intimidation were charged to enforce non-member companies into the conspiracy and to compel persons who needed insurance to buy only from S. E. U. A. members. The defense set forth in a demurrer was that "the business of fire insurance is not commerce." The District Court sustained the demurrer and

held "that the business of insurance is not commerce, either intrastate or interstate" and that it "is not interstate commerce or interstate trade, though it might be considered a trade subject to local laws, either state or federal, where the commerce clause is not the authority relied upon." The case was taken to the Supreme Court by direct appeal and the decision of the District Court was reversed. Mr. Justice BLACK delivered the opinion of the Court and in the opening paragraph of his opinion he says:

For seventy-five years this Court has held, whenever the question has been presented, that the commerce clause of the Constitution does not deprive the individual states of power to regulate and tax specific activities of foreign insurance companies which sell policies within their territories. Each state has been held to have this power even though negotiation and execution of the companies' policy contracts involved communications of information and movements of persons, moneys, and papers across state lines. Not one of all these cases, however, has involved an Act of Congress which required the Court to decide the issue of whether the commerce clause grants to Congress the power to regulate insurance transactions stretching across state lines. Today for the first time in the history of the Court that issue is squarely presented and must be decided.

Stating the questions involved, Mr. Justice BLACK says:

The record, then, presents two questions and no others:

(1) Was the Sherman Act intended to prohibit conduct of fire insurance companies which restrains or monopolizes the interstate fire insurance trade? (2) If so, do fire insurance transactions which stretch across state lines constitute "Commerce among the several States" so as to make them subject to regulation by Congress under the commerce clause? Since it is our conclusion that the Sherman Act was intended to apply to the fire insurance business we shall, for convenience of discussion, first consider the latter question.

* * *

The modern insurance business holds a commanding position in the trade and commerce of our nation. Built upon the sale of contracts of indemnity, it has become one of the largest and most important branches of commerce. Its total assets exceed \$37,000,000,000, or the approximate equivalent of the value of all farm lands and buildings in the United States. Its annual premium receipts exceed \$6,000,000,000, more than the average annual revenue receipts of the United States Government during the last decade. Included in the labor force of insurance are 524,000 experienced workers, almost as many as seek their livings in coal mining or automobile manufacturing. Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

The volume of fire insurance transactions alleged to have been restrained and monopolized by the appellees is described as follows:

... Of the nearly 200 combining companies, chartered in various states and foreign countries, only 18 maintained their home offices in one of the six states in which the S.E.U.A. operated; and 127 had headquarters in either New York, Pennsylvania, or Connecticut. During the period 1931-1941 a total of \$488,000,000 in premiums was collected

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by local agents in the six states, most of which was transmitted to home offices in other states; while during the same period \$215,000,000 in losses was paid by checks or drafts sent from the home offices to the companies' local agents for delivery to the policy holders. Local agents solicited prospects, utilized policy forms sent from home offices, and made regular reports to their companies by mail, telephone or telegraph. Special travelling agents supervised local operations. The insurance sold by members of S.E.U.A. covered not only all kinds of fixed local properties, but also such properties as steamboats, tugs, ferries, shipyards, warehouses, terminals, trucks, busses, railroad equipment and rolling stock, and movable goods of all types carried in interstate and foreign commerce by every media of transportation.

The opinion then takes up the cases the insurance companies relied upon, *Paul v. Virginia*, *Hooper v. California*, *New York Life Insurance Company v. Deer Lodge County*, and of those cases it is said:

In all cases in which the Court has made the statement that "the business of insurance is not commerce," its attention was focused on the validity of state statutes—the extent to which the commerce clause automatically deprived states of the power to regulate the insurance business.

* * *

Today, however, we are asked to apply this reasoning, not to uphold another state law, but to strike down an Act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; and, in so doing, to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines. But past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the commerce clause. Furthermore, the reasons given in support of the generalization that "the business of insurance is not commerce" and can never be conducted so as to constitute "Commerce among the States" are inconsistent with many decisions of this Court which have upheld federal statutes regulating interstate commerce under the commerce clause.

Examining the questions involved, it was declared that—

... In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce.

* * *

The real answer to the question before us is to be found in the commerce clause itself and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause. It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. . . . So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier, . . . to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, . . . to drive a stolen automobile from Iowa to South Dakota, . . . Diseased cattle ranging between Georgia and Florida are in commerce . . . and the transmission of an electrical impulse over a telegraph line between Alabama and Florida is intercourse and subject to paramount federal regulation.

As to the boundary between national and state power

and declaring that the precise boundary has not yet been delimited, Mr. Justice BLACK says:

... The most widely accepted general description of that part of commerce which is subject to the federal power is that given in 1824 by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 189 190: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches. . . ." Commerce is interstate, he said, when it "concerns more States than one." . . . No decision of this Court has ever questioned this as too comprehensive a description of the subject matter of the commerce clause. To accept a description less comprehensive, the Court has recognized, would deprive the Congress of that full power necessary to enable it to discharge its Constitutional duty to govern commerce among the states.

* * *

Our basic responsibility in interpreting the commerce clause is to make certain that the power to govern intercourse among the states remains where the Constitution placed it. That power, as held by this Court from the beginning, is vested in the Congress, available to be exercised for the national welfare as Congress shall deem necessary. No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the commerce clause. We cannot make an exception of the business of insurance.

Coming now to the question earnestly pressed upon the Court by the insurance companies that Congress did not intend in the Sherman Act to exercise its power over the interstate insurance trade, Mr. Justice BLACK says:

Certainly the Act's language affords no basis for this contention. Declared illegal in § 1 is "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . ."; and "every person" who shall make such a contract or engage in such a combination or conspiracy is deemed guilty of a misdemeanor. Section 2 is not less sweeping. "Every person" who monopolizes, or attempts to monopolize or conspires with "any other person" to monopolize, "any part of the trade or commerce among the several States" is, likewise, deemed guilty of a misdemeanor. Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.

Dealing with the argument that virtually all the states regulate the insurance business on the theory that competition in the field of insurance is detrimental both to the insurers and the insured and that if the Sherman Act be held applicable to insurance, much of this state regulation will be destroyed, Mr. Justice BLACK says:

... The first part of this argument is buttressed by opinions expressed by various persons that unrestricted competition in insurance results in financial chaos and public injury. Whether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress, not this Court.

* * *

The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as

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exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. . . . No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices.

Mr. Justice ROBERTS and Mr. Justice REED took no part in the consideration or decision of this case.

The CHIEF JUSTICE delivered a dissenting opinion. He declared that undoubtedly "transactions across state lines which often attend and are incidental to the formation and performance of an insurance contract, are acts of interstate commerce subject to regulation by the federal government under the commerce clause." But, he declares, "such are not the questions now before us."

The case comes here on direct appeal by the Government from the District Court's judgment dismissing the indictment. Under the provisions of the Criminal Appeals Act, 18 U. S. C. § 682, the only questions open for decision here are whether the District Court's constructions of the commerce clause and of the Sherman Act, on which it rested its decision, are the correct ones.

After quoting at length from the opinion of the District Court, the CHIEF JUSTICE summarizes that opinion saying:

In short the District Court construed the indictment as charging restraints not in the incidental use of the mails or other instrumentalities of interstate commerce, nor in the insurance of goods moving in interstate commerce, but in the "business of insurance." And by the "business of insurance" it necessarily meant the business of writing contracts of insurance, for the indictment charges only restraints in entering into such contracts, not in their performance, and the Court deemed it irrelevant that in the negotiation and performance of the contracts appellees "may use the mails and instrumentalities of interstate commerce." It held that that business is not in itself interstate commerce, and that the alleged conspiracies to restrain and to monopolize that business were not, without more, in restraint of interstate commerce and consequently were not violations of the Sherman Act.

The CHIEF JUSTICE analyses the contentions presented by the Government in its brief and says:

If an insurance company in New York executes and delivers, either in that state or another, a policy insuring the owner of a building in New Jersey against loss by fire, no act of interstate commerce has occurred. True, if the owner comes to New York to procure the insurance or after delivery in New York carries the policy to New Jersey, or the company sends it there by mail or messenger, such would be acts of interstate commerce. Similarly if the owner pays the premiums by mail to the company in New York, or the company's New Jersey agent sends the premiums to New York, or the company in New York sends money to New Jersey on the occurrence of the loss insured against, acts of interstate commerce would occur. But the power of the Congress to regulate them is derived, not from its authority to regulate the business of insurance, but from its power to regulate interstate communication and transportation. And such incidental use of the facilities of interstate commerce does not render the insurance business itself interstate commerce.

Undoubtedly contracts so entered into for the sale of commodities which move in interstate commerce may become the implements for restraints in marketing those com-

modities, and when so used may for that reason be within the Sherman Act. . . . But it is quite another matter to say that the contracts are themselves interstate commerce or that restraints in competition as to their terms or conditions are within the Sherman Act, in the absence of a showing that the purpose or effect is to restrain competition in the marketing of the goods or services to which the contracts relate.

The contract of insurance makes no stipulation for the sale or delivery of commodities in interstate commerce or for any other interstate transaction. It provides only for the payment of a sum of money in the event of the loss insured against and it is no necessary consequence of the alleged restraints on competition in fixing premiums, that interstate commerce will be restrained. We have no occasion to consider the argument which the court below rejected, that the indictment charges that the conspiracy to fix premiums adversely affects interstate commerce because in some instances the commodities insured move across state lines, or because interstate communication and transportation are in some instances incidental to the business of issuing insurance contracts. This is so both because, as we have said, we are bound by the District Court's construction of the indictment, and, more importantly, because such effects on interstate commerce, as will presently appear, are not within the reach of the Sherman Act.

The conclusion seems inescapable that the formation of insurance contracts, like many others, and the business of so doing, is not, without more, commerce within the protection of the commerce clause of the Constitution and thereby, in large measure, excluded from state control and regulation.

By way of illustration of other activities which use facilities of transportation and travel across state lines, the CHIEF JUSTICE says:

The practice of law is not commerce nor, at least outside the District of Columbia, is it subject to the Sherman Act, and it does not become so because a law firm attracts clients from without the state or sends its members or juniors to other states to argue cases, or because its clients use the interstate mails to pay their fees.

Speaking of *Paul v. Virginia* and the doctrine of res judicata, the CHIEF JUSTICE says:

This Court, throughout the seventy-five years since the decision of *Paul v. Virginia*, has adhered to the view that the business of insurance is not interstate commerce. Such has ever since been the practical construction by the other branches of the Government of the application to insurance of the commerce clause and the Sherman Act. Long continued practical construction of the Constitution or a statute is of persuasive force in determining its meaning and proper application.

The decision now rendered repudiates this long continued and consistent construction of the commerce clause and the Sherman Act. We do not say that that is in itself a sufficient ground for declining to join in the Court's decision. This Court has never committed itself to any rule or policy that it will not "bow to the lessons of experience and the force of better reasoning" by overruling a mistaken precedent.

To give blind adherence to a rule or policy that no decision of this Court is to be overruled would be itself to overrule many decisions of the Court which do not accept that view. But the rule of stare decisis embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right. This is especially so

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where as here, Congress is not without regulatory power. . . . The question then is not whether an earlier decision should ever be overruled, but whether a particular decision ought to be. And before overruling a precedent in any case it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity.

Concluding his dissenting opinion, the CHIEF JUSTICE says:

Had Congress chosen to legislate for such parts of the insurance business as could be found to affect interstate commerce, whether by making the Sherman Act applicable to them or by regulation in some other form, it could have resolved many of these questions of conflict between federal and state regulation. But this Court can decide only the questions before it in particular cases. Its action in now overturning the precedents of seventy-five years governing a business of such volume and of such wide ramifications, cannot fail to be the occasion for loosing a flood of litigation and of legislation, state and national, in order to establish a new boundary between state and national power, raising questions which cannot be answered for years to come, during which a great business and the regulatory officers of every state must be harassed by all the doubts and difficulties inseparable from a realignment of the distribution of power in our federal system. These considerations might well stay a reversal of long established doctrine which promises so little of advantage and so much of harm. For me these considerations are controlling.

The judgment should be affirmed.

Mr. Justice FRANKFURTER joined in the opinion of the CHIEF JUSTICE.

Mr. Justice JACKSON, dissenting in part, says:

The historical development of public regulation of insurance underwriting in this country has created a dilemma which confronts this Court today. It demonstrates that "The life of the law has not been logic: it has been experience."

For one hundred fifty years Congress never has undertaken to regulate the business of insurance. Therefore to give the public any protection against abuses to which that business is peculiarly susceptible the states have had to regulate it. Since 1851 the several states, spurred by necessity and with acquiescence of every branch of the Federal Government, have been building up systems of regulation to discharge this duty toward their inhabitants.

* * *

The practical and ultimate choice that faced this Court was to say either that insurance was subject to state regulation or that it was subject to no existing regulation at all. The Court consistently sustained the right of the states to represent the public interest in this enterprise. It did so, wisely or unwisely, by resort to the doctrine that insurance is not commerce and hence is unaffected by the grant of power to Congress to regulate commerce among the several states. Each state thus was left free to exclude foreign insurance companies altogether or to admit them to do business on such conditions as it saw fit to impose. The whole structure of insurance regulation and taxation as it exists today has been built upon this assumption.

The doctrine that insurance business is not commerce always has been criticized as unrealistic, illogical, and inconsistent with other holdings of the Court. I am unable to make any satisfactory distinction between insurance business as now conducted and other transactions that are held to constitute interstate commerce.

* * *

The question therefore for me settles down to this: What

role ought the judiciary to play in reversing the trend of history and setting the nation's feet on a new path of policy? To answer this I would consider what choices we have in the matter.

* * *

The principles of decision that I would apply to this case are neither novel nor complicated and may be shortly put:

1. As a *matter of fact*, modern insurance business, as usually conducted, is commerce; and where it is conducted across state lines, it is *in fact* interstate commerce.

2. In contemplation of law, however, insurance has acquired an established doctrinal status not based on present-day facts. For constitutional purposes a fiction has been established, and long acted upon by the Court, the states, and the Congress, that insurance is not commerce.

3. So long as Congress acquiesces, this Court should adhere to this carefully considered and frequently reiterated rule which sustains the traditional regulation and taxation of insurance companies by the states.

4. Any enactment by Congress either of partial or of comprehensive regulations of the insurance business would come to us with the most forceful presumption of constitutional validity. The fiction that insurance is not commerce could not be sustained against such a presumption, for resort to the facts would support the presumption in favor of the congressional action. The fiction therefore must yield to congressional action and continues only at the sufferance of Congress.

5. Congress also may, without exerting its full regulatory powers over the subject, and without challenging the basis or supplanting the details of state regulation, enact prohibitions of any acts in pursuit of the insurance business which substantially affect or unduly burden or restrain interstate commerce.

6. The antitrust laws should be construed to reach the business of insurance and those who are engaged in it only under the latter congressional power. This does not require a change in the doctrine that insurance is not commerce. The statute as thus construed would authorize prosecution of all combinations in the course of insurance business to commit acts not required or authorized by state law, such as intimidation, disparagement, or coercion, if they unreasonably restrain interstate commerce in commodities or interstate transportation. It would leave state regulation intact.

* * *

The orderly way to nationalize insurance supervision, if it be desirable, is not by court decision but through legislation. Judicial decision operates on the states and the industry retroactively.

* * *

A judgment as to when the evil of a decisional error exceeds the evil of an innovation must be based on very practical and in part upon policy considerations. When, as in this problem, such practical and political judgments can be made by the political branches of the Government, it is the part of wisdom and self-restraint and good government for courts to leave the initiative to Congress.

Moreover, this is the method of responsible democratic government. To force the hand of Congress is no more the proper function of the judiciary than to tie the hands of Congress. To use my office, at a time like this, and with so little justification in necessity, to dislocate the functions and revenues of the states and to catapult Congress into immediate and undivided responsibility for supervision of the nation's insurance business is more than I can reconcile with my view of the function of this Court in our society.

The case was argued by Mr. Attorney General Biddle

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for United States and by Mr. John T. Cahill and Mr. Dan MacDougals for Underwriters Association.

Fraternal Benefit Societies—National Labor Relations Act

A fraternal insurance business which affects members and their beneficiaries in twenty-seven states, the transactions of which involve the operation of economic forces across state lines, may be regulated in the respects provided by the National Labor Relations Act.

Polish National Alliance of the United States of North America v. National Labor Relations Board, 88 L. ed. Adv. Ops. 1117; 64 Sup. Ct. Rep. 1196; U. S. Law Week 4446. (No. 226, argued January 11 and 12, decided June 5, 1944).

The National Labor Relations Board found that the Polish National Alliance of the United States of North America, a mutual fraternal insurance company, had violated the National Labor Relations Act and had engaged in unfair labor practices. An order of cessation was accordingly entered. On petition for review and a cross-petition of the board for enforcement, the Circuit Court of Appeals, 7th Circuit, sustained the order. Certiorari was allowed by the Supreme Court and the judgment of the lower court was sustained.

Polish National Alliance as a fraternal society provides death, disability and accident benefits to its members and their beneficiaries. It is incorporated in Illinois and organized into 1817 lodges scattered throughout 27 states, the District of Columbia, and the Province of Manitoba, Canada. It is declared to be the "largest fraternal organization in the world, of Americans of Polish descent" and its transactions run into the millions.

Mr. Justice FRANKFURTER delivered the opinion of the Court. After summarizing the activities and facilities of the Alliance, it is declared that:

... Financial transactions of this magnitude cannot be impeded even temporarily without affecting to an extent not negligible the interstate enterprises in which the large assets of Alliance are invested. That such are the substantial effects on interstate commerce of dislocating labor practices by insurance companies, was established before the Labor Board in at least thirteen comparable situations. The practical justification of such a conclusion has not heretofore been challenged. Considerations like these led the Board to find that petitioner's practices "have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce", and were therefore "unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7)", and as such, prohibited by § 10 of the Wagner Act.

The opinion proceeds to discuss the terms of the Act and applicable decisions and it is said:

We have said enough to indicate the ground for our conclusion that the Board was not unjustified in finding that the unfair labor practices found by it would affect commerce. And the undoubted fact that Alliance promotes, among Americans of Polish descent, interest in, and devotion to, the contributions that Poland has made to civilization does not subordinate its business activities to insignificance. Accordingly, the Board could find that its cultural

and fraternal activities do not withdraw Alliance from amenability to the Wagner Act.

Finding a new question here provided for the first time, the statute and applicable cases are examined and it is said:

We have, therefore, now presented for the first time not an exercise of state but of national power in relation to the insurance business. And so the ultimate question is whether, in view of the relation between the activities of the insurance business before us and the operation of economic forces across state lines, the Constitution denies to Congress the power to say that the interplay of the insurance business and those economic forces is such that its power "to regulate Commerce . . . among the several states" carries with it the power to regulate the conduct here regulated by relevant legislation.

* * *

The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity. On the other hand, the old admonition never becomes stale that this Court is concerned with the bounds of legal power and not with the bounds of wisdom in its exercise by Congress. When the conduct of an enterprise affects commerce among the states is a matter of practical judgment, not to be determined by abstract notions. The exercise of this practical judgment the Constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate. Great power was thus given to the Congress: the power of legislation and thereby the power of passing judgment upon the needs of a complex society. Strictly confined though far-reaching power was given to this Court: that of determining whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised. To hold that Congress could not deem the activities here in question to affect what men of practical affairs would call commerce, and to deem them related to such commerce not by gossamer threads but by solid ties, would be to disrespect the judgment that is open to men who have the constitutional power and responsibility to legislate for the Nation.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

The case was argued by Mr. Ewart Harris for Polish Alliance, and by Mr. Attorney General Francis Biddle for the Government.

Fair Labor Standards Act—Powers of Wage and Hour Division Administrator

Under § 13 (a) (10) of the Fair Labor Standards Act, the Administrator of the Wage and Hour Division is without power to define an exempt "area of production" in such manner as to make the exemption dependent on the number of employees engaged in the establishment in question.

In the present case, the Administrator's definition of the exempt "area of production" having been declared invalid, the cause is remanded to the trial court to be there held for further proceedings after the Administrator shall have issued a valid regulation.

Addison v. Holly Hill Fruit Products, Inc., 88 L. ed. Adv. Ops. 1123; 64 Sup. Ct. Rep. 1125; U. S. Law Week 4438. (No. 217, argued January 10, decided June 5, 1944).

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Employees of the Holly Hill Fruit Products, Inc., sued it for wage payments under the Fair Labor Standards Act and obtained judgment in the District Court which was reversed by the Circuit Court of Appeals. The latter held that the employees by virtue of § 13 (a) (10) of the Act were exempt from its scope because they were "within the area of production (as defined by the Administrator), engaged in . . . canning of agricultural . . . commodities for market . . .". The Circuit Court reached its conclusion by holding that a portion of the definition "area of production" as made by the Administrator of the Wage and Hour Division was invalid, but that the remaining portion afforded exemption. On certiorari the judgment was remanded to the District Court for proceedings in accordance with the Supreme Court's opinion, delivered by Mr. Justice FRANKFURTER.

The Administrator in a regulation of October 20, 1938, defined "area of production" as used in § 13 (a) (10) to include an individual engaged in canning "if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven." An alternative definition effective April 20, 1939, applicable to perishable or seasonal fresh fruits and vegetables brought workers into the "area of production" if employed "in an establishment which is located in the open country or in a rural community and which obtains all of its products from farms in its immediate locality." Open city or rural community was defined as including any city or town of 2,500 or more population and not to include any distance of more than ten miles. Finally the alternative definition not limited to fruits and vegetables was incorporated in regulations effective June 17, 1939, but in addition it was provided that an individual might also be within the "area of production" "if he performs canning operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven."

As determined by the Court, the case turns on the validity of the regulation of 1938 and that of the alternative of the June 17, 1939, regulation. The question as stated by Mr. Justice FRANKFURTER is "when Congress exempted 'any individual employed within the area of production (as defined by the Administrator)' § 13 (a) (10), did it authorize the Administrator not only to designate territorial bounds for purposes of exemption but also to except establishments from such exemption according to the number of workers employed."

In answering this question, the Court considers both the text of the Act and its legislative history. Concluding that the answer must be in the negative, Mr. Justice FRANKFURTER says:

We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the

common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. For we are here not dealing with the broad terms of the Constitution "as a continuing instrument of government" but with part of a legislative code "subject to continuous revision with the changing course of events." . . .

Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. "The natural meaning of words cannot be displaced by reference to difficulties in administration." . . . For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the grant by Congress to the Administrator to define "the area of production" beyond the plain geographic implications of that phrase is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

The details with which the exemptions in this Act have been made preclude their enlargement by implication. While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid "that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." . . . To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation.

We agree therefore with the Circuit Court of Appeals in holding invalid the limitations as to the number of employees within a defined area.

The Administrator's definition having failed, the Court was faced with the question as to how to dispose of the case. Upon consideration of the matter, the conclusion is reached that the Administrator would not necessarily have defined "area of production" merely by deleting the employee provision had he known of its invalidity. On the other hand the Court finds that the writing of a definition is not a judicial function but must still be left to the Administrator. The result reached is that the case is remanded to the District Court with instructions to hold it until the Administrator, by making a valid determination of the "area of production" with all deliberate speed, acts within the authority granted him by Congress. In support of this conclusion, Mr. Justice FRANKFURTER observes:

Such a disposition is most consonant with justice to all interests in retracing the erroneous course that has been taken. Neither law nor logic dictates an "either-or" conclusion—that is, a conclusion that the employment in these industries is entirely exempt because the Administrator misconceived the bounds of his regulatory powers although plainly enough he meant to exercise them so as not to withdraw all these employments from the requirements of the Act, or that employment in these industries is subject to

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the Act because no exception excludes it. The two opposing alternatives do violence to the law as Congress wrote it. To hold that all individuals "engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products" are exempt from the operation of the Act is obviously to fly in the face of Congressional purpose. The Act exempts some but not all of the employees engaged in these industries, and it is not for us now to say that all are exempt. So to hold would postpone the operation of the Act in the enumerated instances for at least six years beyond the date fixed by Congress. Equally offending to the purposes of Congress and therefore to fairness in this situation is the suggestion that if the exemption falls all employees engaged in the designated industries are covered by the Act.

The accommodation that we are making assumes, what we must assume, that the Administrator will retrospectively act as conscientiously within the bounds of the power given him by Congress as he would have done initially had he limited himself to his authority. To be sure this will be a retrospective judgment, and law should avoid retroactivity as much as possible. But other possible dispositions likewise involve retroactivity, with the added mischief of producing a result contrary to the statutory design.

Such an adaptation of court procedure to a remodeling of the situation as nearly as may be to what it should have been initially is not unprecedented.

* * *

In short, the judicial process is not without the resources of flexibility in shaping its remedies, though courts from time to time fail to avail themselves of them. The interplay between law and equity in the evolution of more just results than the hardened common law afforded, has properly been drawn upon in working out accommodating relationships between the judiciary and administrative agencies. And certainly in specific cases, such as those already referred to and in this, it is consonant with judicial administration and fairness not to be balked by the undesirability of retroactive action any more than courts have found it difficult to sanction legislative ratification of acts originally unlawful, . . . or retroactively to give prior legislation new scope.

Mr. Justice RUTLEDGE delivered a dissenting opinion, in which Mr. Justice BLACK and Mr. Justice MURPHY concurred. The dissenting opinion takes the position that the Administrator defined "area of production" in a valid manner and that, therefore, the employees should prevail. The minority expression also states that if the Administrator's definition was not valid, then the exemption was inoperative and for that reason also the employees should prevail. The minority of the Court also dissented from the disposition made by the Court directing the District Court to await the Administrator's retroactive redetermination of the rights of the parties.

Mr. Justice DOUGLAS joined in that part of the dissent which would hold that the Administrator has defined "area of production" in a valid manner.

Mr. Justice ROBERTS delivered a separate opinion saying that the Circuit Court of Appeals was right and that the Administrator's order might well be allowed to stand with the illegal and unauthorized feature of it deleted. However, since the Court was evenly divided on the question whether the judgment of the District Court

should be affirmed or whether the case should be held pending further order of the Administrator, Mr. Justice ROBERTS added:

Entertaining the views which I do, I cannot vote to affirm the judgment of the District Court, but that will be the effect of my action if I vote simply to reverse the judgment of the Circuit Court of Appeals. While I think none of the authorities cited in the opinion of Mr. Justice FRANKFURTER justify the procedure there outlined, I am constrained to vote in accordance with his opinion.

I am clear that, if the Administrator is to be permitted to amend his order, or to enter a new order effective from the date of the one under attack, he may not resort to gerrymandering or to any other device to accomplish by indirection what the decision holds he cannot do directly. I personally believe the scope of his discretion is more limited than some of my colleagues think and I do not wish my concurrence in the remand of the case to the District Court, to be there held pending the promulgation of an amended order, or a new order, to be taken as approving in advance the views expressed as to the extent of the Administrator's discretion.

The case was argued by Mr. George Palmer Garrett and Mr. Ellis F. Davis for Addison, by Mr. G. L. Reeves for Holly Hill Fruit Products, Inc., and by Mr. Douglas B. Maggs for Wage and Hour Division.

Evidence—Involuntary Confessions—Determination of Whether Voluntary or Involuntary.

In a criminal trial in a state court the accused, under the due process clause of the Fourteenth Amendment, may not be convicted on an involuntary confession. But it is for the trial court and the jury to determine whether, on the evidence, the confession was or was not made by the accused while in the possession of mental freedom. The Supreme Court will not overturn the finding of the trial court and the jury on that question unless the conceded facts are irreconcilable with the existence of mental freedom of the accused at the time he confessed.

Lyons v. Oklahoma, 88 L. ed. Adv. Ops. 1076; 64 Sup. Ct. Rep. 1208; U. S. Law Week 4448. (No. 433, decided June 5, 1944).

Certiorari was granted to review a judgment of the Oklahoma Criminal Court of Appeals to determine whether the state courts, contrary to the Fourteenth Amendment, had violated the petitioner's rights in a trial against him for murder, by admitting in evidence his allegedly involuntary confession to the crime charged.

Lyons, the convicted man, in fact made three confessions. The first confession took place eleven days after he had been placed in jail. The questioning leading to that confession began about 6:30 in the evening followed by the confession between 2:00 and 4:00 the next morning. There was evidence that Lyons was assaulted and beaten during this interrogation and it appears that a panfull of the victim's bones was placed in Lyons' lap to bring about the confession. The evidence as to assault on Lyons in obtaining the first confession was conflicting but since that confession was not offered in evidence, its only bearing on the legal question was whether it so affected the second confession as to render the latter involuntary and inadmissible. After the first

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confession, Lyons, in the early morning hours, was taken to the scene of the crime and subjected to further questioning about the instruments which he used to commit the murders. Sometime between 8:00 and 11:00 o'clock the evening of that day, Lyons signed the second confession.

The third confession was made about two days later to a guard in the penitentiary. It was admitted in the trial without objection.

On certiorari the Supreme Court affirmed the conviction in an opinion by Mr. Justice REED. The federal question presented was whether the use of the second confession violated the due process clause of Amendment Fourteen which requires that state criminal proceedings "shall be consistent with the fundamental principles of liberty and justice." *Hebert v. Louisiana*, 272 U. S. 312. In answering this question, the opinion recognizes that there is no fixed formula for determining an issue of this character. Mr. Justice REED says:

No formula to determine this question by its application to the facts of a given case can be devised. Here improper methods were used to obtain a confession, but that confession was not used at the trial. Later, in another place and with different persons present, the accused again told the facts of the crime. Involuntary confessions, of course, may be given either simultaneously with or subsequently to unlawful pressures, force or threats. The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances. . . . The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of "mental freedom" to confess to or to deny a suspected participation in a crime.

When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision.

Upon a review of the circumstances, the Supreme Court concludes that the inference of guilt based upon Lyons' second confession is not so illogical and unreasonable as to constitute a denial of a fair trial in violation of the Fourteenth Amendment. The opinion notes that the fact that an involuntary confession was obtained from the accused does not, under the Fourteenth Amendment, forbid the use of all subsequent confessions whether voluntary or involuntary.

Mr. Justice DOUGLAS concurred in the result. Mr. Justice RUTLEDGE dissented without opinion.

Mr. Justice MURPHY delivered a brief dissenting opinion in which Mr. Justice BLACK concurred. The dissenting opinion proceeds upon the theory that the technique of confession here used constitutes one single

continuous transaction, and that the admission of such a tainted confession does not accord with the requirements of the Fourteenth Amendment that a state shall not convict a defendant on evidence which he is compelled to give against himself.

The case was argued by Mr. Thurgood Marshal for Lyons and by Mr. Sam H. Lattimore for the State of Oklahoma.

Espionage Act—Elements of Crime Under That Act—Necessity for Proof of Specific Intent

Under the Espionage Act of 1917 the two major elements necessary to constitute an offense under Section 3 are: (1) the existence of a specific intent at the time of the alleged overt acts to cause insubordination or disloyalty in the armed forces or to obstruct the recruiting and enlistment service; and (2) the existence of a clear and present danger that the activities charged will bring about the substantive evils which Congress has a right to prevent. Both elements must be proved by the Government beyond reasonable doubt.

In the present case, the majority of the Supreme Court find that there was insufficient evidence to prove the necessary intent and hence hold that the conviction cannot stand.

Hartzel v. United States, 88 L. ed. Adv. Ops. 1163; 64 Sup. Ct. Rep. 1233; U. S. Law Week 4467. (No. 531, argued April 25, decided June 12, 1944).

On an indictment in seven counts brought under the Espionage Act of 1917, Hartzel was convicted by a jury for violating that Act in that, in time of war, he willfully attempted to cause insubordination, disloyalty, mutiny and refusal of duty in the armed forces and willfully obstructed the recruiting and enlistment service of the United States. The jury found Hartzel guilty on all seven counts of the indictment and he was sentenced to five years' imprisonment. The Circuit Court of Appeals affirmed his conviction, but on certiorari the judgment was reversed by the Supreme Court.

Mr. Justice MURPHY announced the conclusion and judgment of the Court in favor of reversal. His opinion outlines the evidence adduced against Hartzel at the trial. The statutory crime and an analysis of its meaning appear in the following portion of the opinion:

On the basis of these facts, petitioner was found guilty of violating the second and third clauses of Section 3 of the Act. These clauses are directed at those who, in time of war, "willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States," or who, in time of war, "willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States." Thus these clauses punish the making and dissemination of statements and writings which are intended to have the evil effects set forth by Congress. No question is here raised as to the constitutionality of these provisions or as to the sufficiency of the indictment returned thereunder. But such legislation, being penal in nature and restricting the right to speak and write freely, must be construed narrowly and "must be taken to use its words in a strict and accurate sense." Mr. Justice Holmes, dissenting in *Abrams v. United States*, 250 U. S. 616 at 627.

The language of the second and third clauses of Section 3 makes clear that two major elements are necessary to constitute an offense under these clauses. The first element is a subjective one, consisting of a specific intent or evil purpose

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at the time of the alleged overt acts to cause insubordination or disloyalty in the armed forces or to obstruct the recruiting and enlistment service. This requirement of a specific intent springs from the statutory use of the word "willfully." That word, when viewed in the context of a highly penal statute restricting freedom of expression, must be taken to mean deliberately and with a specific purpose to do the acts proscribed by Congress. . . . The second element is an objective one, consisting of a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent. *Schenck v. United States*, 249 U. S. 47. Both elements must be proved by the Government beyond a reasonable doubt.

Upon this analysis of the statute, Mr. Justice MURPHY concludes that the facts proved against Hartzel were insufficient to support a verdict of guilty against him. While it is recognized that the literature which Hartzel prepared and disseminated contained notions odious to the majority of our people and destructive of national unity in time of war, nevertheless it is found to fall short of showing the narrow intent requisite to the requirements of the Espionage Act. Summarizing the purport of the evidence, Mr. Justice MURPHY says:

There is nothing on the face of the three pamphlets in question to indicate that petitioner intended specifically to cause insubordination, disloyalty, mutiny or refusal of duty in the military forces or to obstruct the recruiting and enlistment service. No direct or affirmative appeals are made to that effect and no mention is made of military personnel or of persons registered under the Selective Training and Service Act. They contain, instead, vicious and unreasoning attacks on one of our military allies, flagrant appeals to false and sinister racial theories and gross libels of the President. Few ideas are more odious to the majority of the American people or more destructive of national unity in time of war. But while such iniquitous doctrines may be used under certain circumstances as vehicles for the purposeful undermining of the morale and loyalty of the armed forces and those persons of draft age, they cannot by themselves be taken as proof beyond a reasonable doubt that petitioner had the narrow intent requisite to a violation of this statute.

Nor do the circumstances of the distribution of the three pamphlets, supplemented by petitioner's pretrial statement, his testimony and the similar articles written and disseminated by him before the war, supply sufficient evidence of the necessary intent. There was no evidence that petitioner intended to influence military personnel or individuals of draft age in the manner forbidden by the statute in composing his mailing list or in sending his pamphlets to those listed therein. His purpose, rather, appears to have been to obtain the names of prominent individuals and organizations and to propagate his ideas among them. The fact that some of these individuals and some of the representatives of these organizations were of draft age was not shown to have been dominant, or even present, in petitioner's mind or to have motivated him in any degree. And the fact that he mailed his pamphlets to at least four high ranking Army officers and addressed envelopes to at least eighteen others is not evidence from which the jury could infer beyond a reasonable doubt that he intended to cause insubordination, disloyalty, mutiny or refusal of duty among them. Their inclusion in a mailing list of six hundred persons and organizations is quite consistent with a mere intent to influence public opinion and to circulate malicious political propaganda among outstanding personages, whether they be in the armed forces or not.

Mr. Justice ROBERTS, without discussing the evidence

in detail, noted briefly that in his judgment it was enough to say that the evidence was insufficient to warrant submission of the case to the jury and that the conviction of violation of the statute should therefore be reversed.

Mr. Justice REED delivered a dissenting opinion in which Mr. Justice FRANKFURTER, Mr. Justice DOUGLAS and Mr. Justice JACKSON concurred. The dissenting opinion emphasizes that the function of the Court is a very limited one—that of deciding whether or not there was sufficient evidence for the trial judge to let the case go to the jury and whether the jurymen had warrant for their finding that Hartzel's very purpose was to undermine the will of our soldiers to fight our Nazi enemy and whether the Circuit Court of Appeals was warranted in sustaining such a finding. Taking a different view of the evidence from that held by the majority of the Court, the dissenting opinion concludes that the judgment should have been affirmed. The dissent says in part:

We are not a jury passing on Hartzel's state of mind. Our sole and very limited duty is to decide whether there was evidence enough warranting the trial judge letting the case go to the jury, whether 12 jurymen had warrant for their finding that Hartzel's very purpose was to undermine the will of our soldiers to fight our Nazi enemy, and whether the Circuit Court of Appeals was warranted in sustaining such a finding. We are at a loss to know what other intent is to be attributed to the dissemination of these documents to our soldiery. To adapt the language of Mr. Justice Holmes speaking for a unanimous Court in *Schenck v. United States*, 249 U. S. 41, 51, of course the documents would not have been sent unless they had been intended to have some effect, and we do not see what effect they could be expected to have upon persons in the military service except to influence them to obstruct the carrying on of the war against Germany when petitioner deemed that a betrayal of our country.

As the trial judge aptly stated:

"All of the circumstances of the case, it seems to me, the very language of the pamphlets composed and distributed by Hartzell show such intent. For what purpose other than hindering the carrying on of the war in any way did he have or could he have had in mind? He appeared on the stand to be an unusually shrewd person. The story he tells of his education and his activities indicate that whatever he does is deliberate and with a definite purpose. He is not a fanatic attached to a cause, having political and economic theories for the liberation of oppressed peoples as were the defendants in *Pierce v. United States*, 252 U. S. 239, and *Abrams v. United States*, 250 U. S. 616, where Justice Holmes and Brandeis in dissenting opinions found that the literature distributed by the defendants had as its purpose propagating certain economic ideas rather than interfering with enlistment or recruiting or insubordination or disloyalty to the army. In this case the jury were warranted in presuming from the preparation and circulation of the literature that Hartzell intended to obstruct enlistment and recruiting and to cause insubordination and disloyalty in the military service of the United States."

On these facts we would intrude on the historic function of the jury in criminal trials to say that the requisite intent "to cause insubordination, disloyalty, or refusal of duty, in the military or naval forces" was lacking. The right of free speech is vital. But the necessity of finding beyond a reasonable doubt the intent to produce the pro-

hibited result affords abundant protection to those whose criticism is directed to legitimate ends.

The case was argued by Mr. Ode L. Rankin for Hartzel and by Mr. Solicitor General Fahy for the United States.

**Evidence—Privilege Against Self-Incrimination—
Personal in Essence—Not Applicable to a
Labor Union**

Under the Fourth and Fifth Amendments the privilege against self-incrimination is a personal one for the protection of the individual, and does not extend to a labor union, corporation or unincorporated organizations. Hence, a labor union may be required to produce its books and records in proper proceedings in the federal courts; and an official of the union, having custody of its books and records, may be punished for contempt for failure to produce them under a subpoena *duces tecum*.

United States v. White, 88 L. ed. Adv. Ops. 1149; 64 Sup. Ct. Rep. 1248; U. S. Law Week 4471. (No. 366, argued March 6, decided June 12, 1944).

In a grand jury investigation of alleged irregularities in the construction of a Naval Supply Depot, a federal District Court issued a subpoena in *duces tecum* to Local No. 542, International Union of Operating Engineers, requiring the Union to produce for the grand jury copies of its constitution and by-laws and specifically enumerated records of the Union showing its collection of work permit fees, the amounts paid for them and the identity of the payors for a period of approximately one year prior to the investigation. White, describing himself as assistant supervisor of the Union, appeared before the grand jury; and while it was not shown that he was the authorized custodian of the books, he had the demanded documents in his possession. He declined to produce them upon the ground that they might tend to incriminate the Union or himself as an officer thereof or individually.

The District Court found him in contempt because of his refusal and sentenced him to thirty days in prison. The Circuit Court of Appeals reversed the judgment by divided vote. On certiorari the judgment of the Circuit Court was reversed and that of the District Court affirmed in an opinion by Mr. Justice MURPHY. The only issue in the case relates to the nature and scope of the constitutional privilege against self-incrimination in support of which White relied upon the unreasonable search and seizure clause of the Fourth Amendment and the guaranty of the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself. The Court holds that neither Amendment, both of which are directed to protection of individual and personal rights, requires recognition of the privilege of self-incrimination under the circumstances present here. The constitutional privilege against self-incrimination is said to be a personal one applying only to individuals, and to grow out of the high sentiment and regard of our jurisprudence in conducting criminal trials and investigations upon a plane of dignity, humanity and impartiality.

Since the privilege is purely personal, it can not be utilized upon or on behalf of an organization such as a corporation. The basis on which the restriction of

the privilege rests is described as follows in the language of Mr. Justice MURPHY:

The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations.

The fact that the state charters corporations and has visitatorial powers over them provides a convenient vehicle for justification of governmental investigation of corporate books and records. But the absence of that fact as to a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities effective, nor does it confer upon such an organization the purely personal privilege against self-incrimination. Basically, the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws, with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.

It follows that labor unions, as well as their officers and agents acting in their official capacity, cannot invoke this personal privilege. This conclusion is not reached by any mechanical comparison of unions with corporations or with other entities nor by any determination of whether unions technically may be regarded as legal personalities for any or all purposes. The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity. Labor unions—national or local, incorporated or unincorporated—clearly meet that test.

Mr. Justice ROBERTS, Mr. Justice FRANKFURTER and Mr. Justice JACKSON concurred in the result.

The case was argued by Mr. Assistant Attorney General Tom C. Clark for the Government and by Mr. Robert J. Fitzsimmons for White.

SUMMARIES

Taxation—Prior Depletion Deductions of Lessor as Income where Lease is Terminated without Production

Douglas v. Commissioner of Internal Revenue, 88 L. ed. Adv. Ops. 975; 64 Sup. Ct. Rep. 988; U. S. Law

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Week 4385. (Nos. 130-133, argued March 7, decided May 15, 1944).

The taxpayers were co-owners of a mine which they leased to a corporation in 1929 for a term of thirty years, subject to the lessee's power to cancel at the end of eight years. The lessee contracted to pay a specific royalty for ore removed, and guaranteed a minimum royalty. The lessee surrendered the lease in 1937, having removed no ore but having paid the required minimum royalties. The taxpayers took depletion deductions against these royalties in the years received. The Commissioner required them to report the total of these deductions as income in 1937. One of the taxpayers had a net loss for one of the prior years, so that the depletion deduction did not affect her tax liability for that year. The Board of Tax Appeals upheld the Commissioner, except with respect to the deduction which produced no tax benefit (46 B.T.A. 943). The circuit court, however, upheld both assessments (134 F (2d) 762).

Upon certiorari, the tax with respect to deductions which had produced a tax benefit was sustained by a 6-2 division of the Court. The circuit court's decision with respect to the loss year deduction was also sustained, but by an equally divided court and without opinion. Mr. Justice JACKSON did not participate.

The opinion of the Court by Mr. Justice REED upheld the pertinent Treasury regulation as reasonable rule-making within the broad delegation of the depletion statute. Since depletion is fundamentally grounded upon extraction, the deduction taken against bonuses or advance royalties must be restored to income when the lease is terminated without production. The opinion rejected the taxpayer's arguments that the regulation was inconsistent with the basis-adjustment provisions of the statute, and that the accumulation of the deductions as income in one year distorts the net income. Apparently undisturbed by Congress' rejection of the *Bruun* doctrine, the Court cited the income which had been held taxable to a lessor upon the surrender of a leasehold with improvements made by the lessee.

The dissenting opinion by Mr. Justice RUTLEDGE, Mr. Justice MURPHY concurring, emphasized the pyramiding of the deductions into the taxable income of one taxable year, and characterized the regulations as a "snare for the unwary who violate no law but comply with it fully," which makes the taking of the deduction "hazardous, capricious, and unjust in consequence."

The case was argued by Mr. Kimball B. De Voy for petitioners and by Miss Helen R. Carlross for respondent.

Municipal Bonds—Special Assessments—State Law Controlling as to Rights and Procedure for Enforcement of Remedies

Huddleston v. Dwyer, 88 L. ed. Adv. Ops. 933; 64 Sup. Ct. Rep. 1015; U. S. Law Week 4397. (No. 628, argued April 25 and 26, decided May 15, 1944).

Proceedings were had in a federal District Court in Oklahoma for the enforcement of special assessments on defaulted paying bonds issued by the City of Poteau, Oklahoma. The District Court under instructions from the Circuit Court on an earlier appeal determined the amounts due on certain assessments against the lots in question and when it appeared that no funds had been provided for the payment of overdue assessments, the District Court by mandamus directed the making of certain annual levies in connection with the county general fund levies sufficient to pay assessment installments which were due, together with interest.

One of the defenses to the petition for mandamus was that under Oklahoma law a county is without authority to levy and collect a tax in one year to pay improvement assessments due in an earlier year. The Circuit Court overruled the defense after an examination of various Oklahoma rulings. A petition for rehearing was filed and it was denied September 1, 1943. On December 17, 1943, the tax officials again petitioned for rehearing relying upon a more recent opinion of the Supreme Court of Oklahoma which superseded that court's earlier opinion which the Circuit Court of Appeals had relied upon in deciding this case. It was contended that the later opinion as an authoritative statement of state law required a result contrary to that reached by the Circuit Court. Nevertheless, the Circuit Court denied the petition for rehearing, but on certiorari its ruling was reversed by the Supreme Court in the *per curiam* opinion.

This opinion emphasizes that the state law is the controlling rule of decision as to both substantive and procedural rights of the parties. The Court points out that a judgment of a federal court governed by state law and correctly applying that law as declared by the state courts when the judgment was rendered, must be reversed upon appellate review if, in the meantime, the state courts have disapproved of their former rulings and have adopted a different one. The federal courts must apply the state laws under the Rules of Decision statute in accordance with the then controlling decision of the highest state court until such time as the case is no longer *sub judice*.

The case was argued by Mr. William E. Davis for Huddleston and by Mr. William L. Curtis for Dwyer.

Expediting Act—Proceedings in Bankruptcy Involving Claims Under Anti-Trust Laws—Not Suits in Equity Under Expediting Act

Columbia Gas & Electric Corporation v. American Fuel and Power Company, et al. 88 L. ed. Adv. Ops. 1011; 64 Sup. Ct. Rep. 1068; U. S. Law Week 4411. (No. 814, decided May 22, 1944).

An appeal was taken from a judgment of the District Court direct to the Supreme Court under Section 2 of the Expediting Act of February 11, 1903. The United States, an intervenor in the District Court, moved to

REVIEW OF RECENT SUPREME COURT DECISIONS

dismiss the appeal as unauthorized by the Expediting Act.

The judgment appealed from originated in proceedings under Chapter X of the Bankruptcy Act for the reorganization of American Fuel and Power Company and two of its subsidiaries. Columbia Gas and Electric Corporation filed proofs of claims in the reorganization proceedings, both as stockholder and as a creditor. A compromise settlement of its claims was made; but it was upset by a reversal in the Circuit Court of Appeals. The Circuit Court held that Columbia's claims had been acquired and used in violation of the anti-trust laws and consequently were not provable or allowable in the reorganization. Upon remand to the District Court, the United States was permitted to intervene, on its claim that it was concerned in arresting any action of the bankruptcy court which might tend to defeat relief which it was seeking in an equity suit pending in the District Court in Delaware for the purpose of restraining violation of the anti-trust laws by Columbia. The United States also objected to the allowance of Columbia's claims in the bankruptcy court. The bankruptcy court, after trial, found that Columbia's claims arose out of acts in violation of the anti-trust laws and disallowed the claims.

In a *per curiam* opinion the Supreme Court dismissed the appeal because unwarranted by the Expediting Act. The opinion points out that the proceeding is neither a "suit in equity" nor is the "United States a complainant" therein, nor is it a suit "brought under" the anti-trust laws.

Mr. Justice DOUGLAS and Mr. Justice JACKSON did not participate.

The case was argued by Mr. Floyd C. Williams and Frank W. Cattle for Columbia Gas and Electric, and by Mr. L. J. Obermeier for American Fuel and Power.

Bankruptcy Proceedings—Receivers Appointed to Collect Rents and Proceeds—Fiduciary Duties in Connection with the Sale of Property

Crites, Inc. v. Prudential Insurance Company, et al., 88 L. ed. Adv. Ops. 989; 64 Sup. Ct. Rep. 1075; U. S. Law Week 4403. (No. 317, argued March 1, decided May 22, 1944).

The insurance company here held mortgages on eleven contiguous parcels of farm land in Ohio for \$192,000, executed by Crites and his wife. Involuntary bankruptcy proceedings were brought against Crites. Petitioner is a corporation formed by creditors in an effort to salvage something from the farms. Simkins and Florence were appointed co-receivers to collect the rents and proceeds and to manage the property and preserve it, all subject to the court's supervision.

Decrees of foreclosure were entered and a public sale was ordered for cash at not less than two-thirds of the appraised value. The up-set price was fixed at

\$162,720 and the farms were bid in by the insurance company at the sale for \$163,900. The decreed indebtedness upon the eleven mortgages amounted to \$223,742.32.

It appears that Simkins, before the public sale, had submitted to the insurance company an offer from a prospective buyer to buy the eleven farms and a one-half interest in the growing corn crops thereon for \$249,106 but he made no effort to inform either the district judge or Crites, Inc. of these facts prior to or at the sale. Two days after the sale the insurance company accepted the offer to purchase which had been previously submitted. Simkins received from the agent of the ultimate purchaser some \$2,797, nearly all of which was in payment for aid in consummating the purchase of the farms from the insurance company.

The present proceedings arose in connection with the receivers' claims and the approval of their accounts.

The Supreme Court holds, in an opinion by Mr. Justice MURPHY, that notwithstanding that Simkins had no authority to sell the farms or that the sales were conducted by the marshal under direct supervision of the court, or that there was no evidence that Simkins unduly influenced the execution of the sales, nevertheless as an arm of the court he was under duty to exercise the high degree of care demanded of a trustee. It is therefore held that he was accountable for any amounts received from the ultimate purchaser's agent for assistance in consummating the resale of the farms by the insurance company.

The Court holds that Simkins is not surchargeable with any commission received by the purchaser's agent, with any amount received by the insurance company or with any amount by which the appraised value of the farms exceeded the decree indebtedness.

The Court also holds that the circumstances referred to plus the fact that Simkins had entered into a fee-splitting arrangement with the attorneys for the insurance company compels the conclusion that all claims for fees and compensation as co-receiver should have been denied.

Mr. Justice ROBERTS stressed the opinion that certiorari should not have been granted in this case saying that the question presented was really whether the action of the Circuit Court of Appeals was sufficiently drastic in the circumstances. Referring to his comments in *Bailey v. Central Vt. Ry. Co.*, 319 U. S. 350, he suggests that failure on the part of the Supreme Court to leave cases of this character to the Circuit Courts of Appeals will impair the performance to the Supreme Court's essential function.

The case was argued by Mr. Isaac E. Ferguson and Mr. Joseph Rosenbaum for Crites, Inc., and by Mr. Osmer C. Ingalls and Mr. Clarence D. Laylin for Prudential Insurance Company of America.

Federal Indian Law—Allotment of Lands in Severalty—Discretion of Secretary of Interior

Arenas v. United States, 88 L. ed. Adv. Ops. 996; 64 Sup. Ct. Rep. 1090; U. S. Law Week 4400. (No. 463, argued March 6 and 7, decided May 22, 1944).

Arenas, a full-blood Mission Indian, sued in a federal District Court for a trust patent to certain lands on the Palm Springs Reservation. The Government was granted a summary judgment of dismissal on affidavits and on the record of the St. Marie litigation on like claims for similarly situated Indians. No findings were made by the District Court and the Circuit Court of Appeals affirmed, chiefly in reliance upon its previous decision in the St. Marie case. On certiorari the judgment was unanimously reversed by the Supreme Court in an opinion by Mr. Justice JACKSON. The opinion reviews the policy of Congress in imposing a system of individual land tenure on the Indians as rapidly as their advancement in civilization, in the opinion of the Secretary of the Interior, found them to be capable of owning and managing land in severalty.

In 1921 the Secretary, pursuant to authority and direction contained in an Act of Congress of March 2, 1917, appointed one Wadsworth as Special Allotting Agent at Large for the Mission Indian Reservation of California and instructed him to prepare schedules of selections for allotments thereon. In 1923 Wadsworth filed a schedule showing selections on the Palm Springs Reservation for fifty members of the Band. This was expressly disapproved by the Secretary. He ordered Wadsworth to prepare a new schedule listing only selections voluntarily made and to leave off those who did not desire allotments. This Wadsworth did; but the certificate of selection for allotment was stamped "Not valid unless approved by the Secretary of the Interior." This schedule of allotments was never approved by the Secretary. The opinion cites instructions which Wadsworth received from the Indian Department, the recommendation of the General Land Office that the schedule be approved and some correspondence which Wadsworth had, all of which tended to show that the final issue of the patent would be forthcoming as a matter of course. Notwithstanding, the Secretary never approved the allotments.

In disposing of the case, the opinion of the Court points out that under the law the Secretary has not an uncontrolled discretion and that, in any event, the government has not established the falsity of the allegations of the complaint that the Secretary had made a preliminary decision as to the allotments.

As to the Secretary's discretion respecting the final approval of the allotments, the opinion observes that this is the crux of the law suit, and that in this final step, Congress has invested the Courts with some responsibility. The Act of August 15, 1894, is cited; and the conclusion is reached that the judgment should be reversed and the cause remanded to the District Court, where the Government should be required to answer,

and the trial judge should proceed to the disposition of the case upon a trial, findings and judgment in regular course.

The case was argued by Mr. John W. Preston and Mr. Oliver C. Clark for Arenas and by Mr. Norman MacDonald for the government.

Taxation—Disallowance of Income Tax Deduction to Declaring Corporation of Wisconsin Privilege Dividend Tax

Wisconsin Gas and Electric Co. v. United States, 88 L. ed. Adv. Ops. 1032; 64 Sup. Ct. Rep. 1106; U. S. Law Week 4414. (No. 565, argued March 10, decided May 29, 1944).

The taxpayer sought a deduction for federal income tax on account of the tax paid by it with respect to the payment of dividends under the Wisconsin "privilege dividend" tax. This is the tax considered by the Supreme Court in *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, and in *International Harvester Co. v. Wisconsin Dept. of Taxation* (May 29, 1944, discussed at p. 416 supra). The taxpayer claimed the deduction alternatively as "taxes paid or accrued within the taxable year," or as "taxes imposed upon a shareholder of the corporation upon his interest as shareholder which are paid by the corporation without reimbursement from the shareholder."

In an opinion by Mr. Justice RUTLEDGE, the Court denied the deduction under both provisions of the statute. Although the corporation was obligated to pay the tax, the tax was "imposed" upon the shareholders. On the alternative contention, it was held that the statute was intended to apply to voluntary payments, and that the withholding of the tax from the dividend amounted to "reimbursement."

The case was argued by Mr. Van B. Wake for the Gas Company and by Mr. Assistant Attorney General Samuel O. Clark for the United States.

Common Carriers by Railroad—Land Grant Rates—Construction of Freight Land Grant Equalization Agreement

Southern Railway Company v. The United States, 88 L. ed. Adv. Ops. 809; 64 Sup. Ct. Rep. 869; U. S. Law Week 4324. (No. 578, argued March 28 and 29, decided April 24, 1944).

Certiorari to review a judgment of the Court of Claims in a suit brought by the railroad to recover freight charges alleged to be due for some 374 shipments of Government property over the railroad company's lines. The railroad, in 1933, made a contract called "Freight-Land-Grant Equalization Agreement," with the Quartermaster General acting for the United States. By that agreement the railroad agreed to transport government property for which the Government is lawfully entitled to reduced rates over land-grant roads and to accept "the lowest rates lawfully available, as

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REVIEW OF RECENT SUPREME COURT DECISIONS

derived through deductions account of land-grant distance from the lawful rates filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement." The purpose of the agreement was to enable the carrier to participate in government traffic which otherwise would be routed over land-grant routes, the so-called land-grant roads being under an obligation to furnish transportation to the Government free of charge or at reduced rates. At the time the agreement was made land-grant rates were required to allow the Government 50% deduction from the commercial rates for transportation of government property or troops. It appears in this case that the shipments in question were billed with the deductions which would apply under certain land-grant routes which were available for the shipments. However, it was shown that a longer and more circuitous route could have been used which contained more land-grant mileage (with consequent lower rates to the Government) than the alternative route chosen in this case by the railroad. Since there was this more circuitous route over which government shipments were entitled to greater reductions on account of greater land-grant mileage, the Court of Claims denied relief, basing its decision on the above-quoted provision of the contract.

The Supreme Court affirmed, in an opinion by Mr. Justice DOUGLAS. The Court rejects the railroad's contention that the word "available" as used in the contract should be construed to mean "capable of being employed or made use of with advantage." In this connection the railroad argued that it would have been improvident to make the shipments over the alternative route adopted here by the Government. The railroad also argued that the equalization agreement properly construed requires the railroad to equalize the rate computed by land-grant routes which are competitive for government traffic and urged that the alternative route adopted here was not competitive. The Supreme Court rejects these arguments. Mr. Justice DOUGLAS says in part: "We cannot assume that the United States intended to surrender any of those benefits by granting the equalizing carriers more favorable rates than those to which it was lawfully entitled on the land-grant routes, unless the purpose to do so was plainly expressed. It must be remembered that the equalization agreement was a rate-making agreement. Its object was to divert shipments to the non-land-grant route. The land-grant route was chosen merely for the purpose of computing the rate. The fact that in a given case the shipment probably would not have moved over the land-grant route is immaterial. The United States was bargaining for low rates for the shipment of its property. It did not differentiate between the types of property shipped. It did not in terms state that land-grant routes, though actually available, would not be used in computing the rate unless they would

in fact have been convenient or practicable to use for the particular shipment. The standard it prescribes is 'the lowest net rates lawfully available.' We may not resolve any ambiguities which may linger in that phrase against the United States."

The case was argued by Mr. Sidney S. Alderman for the railroad and by Mr. Assistant Attorney General Shea for the Government.

Taxation—Jurisdiction of Federal Courts in Suit against Local Collector for Illegal Taxes

Great Northern Life Insurance Co. v. Read, 88 L. ed. Adv. Ops. 781; 64 Sup. Ct. Rep. 873; U. S. Law Week 4331. (No. 235, argued January 31, decided April 24, 1944).

The taxpayer challenged the constitutionality under the Fourteenth Amendment of an Oklahoma tax upon foreign insurance companies upon the ground that it was discriminatory as compared with the taxation of domestic insurance companies. Having paid the tax to the Insurance Commissioner under protest, it sued that official in the District Court of the United States, alleging diversity of citizenship. The constitutionality of the tax was upheld in that court and in the Circuit Court of Appeals. Upon grant of certiorari, the Supreme Court asked discussion of the right of the taxpayer to maintain its suit in a federal court.

In an opinion by Mr. Justice REED, the cause was remanded to the District Court with directions to dismiss the complaint for want of jurisdiction. The court pointed out that the suit was against a state official as such, and was therefore the equivalent of a suit against the state. Since such suit could be maintained only with the state's consent, and in accordance with the terms of such consent, the Court analyzed the state statute and determined that it authorized suit only in the state court.

... When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts. . . .

Mr. Justice FRANKFURTER, with whom the CHIEF JUSTICE and Mr. Justice ROBERTS concurred, dissented. The opinion argues that this was a "simple suit to get back money from a collector," which would be clearly allowable if brought against him in his individual capacity, and that the result should not be different because the suit was differently entitled. Assuming that the state's consent to the suit was required, the dissent contends that a refusal of such consent with respect to suit in federal courts should not be presumed where the procedural requirements of the state statute are not peculiarly adapted to procedure in the state courts.

The case was argued by Mr. Charles R. Holton and Mr. John A. Johnson for Great Northern Life Insurance Company and by Mr. Fred Hansen for the Insurance Commissioner.

NOTICE TO MEMBERS OF JUNIOR BAR CONFERENCE

Proposed Amendments to the Constitution of the American Bar Association

(Continued from page 403)

tinguish readily the recommendation from the body of the report; (c) all recommendations for action shall be accompanied by a statement in the report of the reasons thereof; (d) when legislation is proposed or opposed, the report shall be accompanied by a copy of the bill or by a summary of its provisions; and (e) when a report on legislation is not accompanied by a copy of the bill,

the section shall make available for distribution at the meeting at which the report is to be considered at least 50 copies of the bill. Recommendations of a Section or of the National Conference of Commissioners on Uniform State Laws may be acted upon at any meeting of the House of Delegates immediately following or held contemporaneously with a meeting of the Section or of the Conference, provided such recommendations, in printed or mimeographed form, have been distributed to the members of the House prior to the session of the House at which such reports are to be considered.

HARRY S. KNIGHT, *Secretary*

NOTICE TO MEMBERS OF JUNIOR BAR CONFERENCE

NOTICE is hereby given that at the annual meeting of the Junior Bar Conference to be held in Chicago, beginning September 10, 1944, there will be elected a chairman, vice chairman, and secretary, each for a term of one year, a member of the Executive Council from each of the Second, Fourth, Sixth, Eighth and Tenth Judicial Circuits, each for a term of two years, and from the Third and Ninth Judicial Circuits, to fill vacancies, each for a term of one year.

Pursuant to Section 4(B) of Article IV of the By-Laws, notice is hereby given that the members of the Junior Bar Conference residing in the above-named Judicial Circuits (hereinafter referred to as Council Districts) may nominate candidates for the office of member of the Council from their respective districts by written petition, in each case, specifying the name of the person nominated and the office for which nominated, containing the names of at least twenty endorers, all of whom are residents of the district of the person nominated. The petition can state briefly a biographical sketch of the background and qualifications of the candidate. It shall be submitted to the chairman, James P. Economos, 1140 N. Dearborn St., Chicago 10, Illinois, not later than August 26, 1944. At the first session of the annual meeting the chairman of the Conference shall deliver to the chairman of the Nominating Committee all petitions submitted pursuant to this notice.

The Nominating Committee shall consider the candidates proposed by each of said petitions, as well as receive names of other candidates and report its Council nominees at the same time and place, and in the same manner that it reports the nominations for the officers of the Conference. Other nominations for the Council may be made from the floor following the report of the Nominating Committee, as may other nominations also be made for officers. The election of the Council members shall take place at the same time and place, and in

the same manner as the election of officers, immediately following the conclusion of the second general session of the annual meeting, and shall be by written ballot.

TERM OF OFFICE: The term of office of the officers and the Council members from the Third and Ninth Judicial Circuits elected at the Chicago annual meeting shall begin with the adjournment of the said annual meeting and end with the adjournment of the annual meeting to be held in 1945, or until their successors shall be elected and qualify, and the term of office of the Council members from the Second, Fourth, Sixth, Eighth and Tenth Judicial Circuits shall begin with the adjournment of the 1944 annual meeting and end with the adjournment of the annual meeting to be held in 1946, or until their successors shall be elected and qualify.

ELIGIBILITY: No person shall be elected as an officer or member of the Council if he will, during his term of office, become ineligible for membership in the Conference. The membership of a member of the Conference shall terminate at the conclusion of the annual meeting in the calendar year within which the member attains the age of thirty-six years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. A person elected as a member of the Council shall be, at the time of his nomination, a resident of the Council District for which he is chosen. No person shall be eligible for election as a member of the Executive Council if he is then a member of the Council and has been such a member for a period of three years or more.

HUBERT D. HENRY, *Secretary*
Junior Bar Conference of the
American Bar Association.

JUNIOR BAR NOTES

By HUBERT D. HENRY

Secretary, Junior Bar Conference

THE manpower situation in the Junior Bar has been stabilized to some extent, and there has been a lull, which we hope is not temporary, in the taking of Junior Bar Conference official personnel by the armed forces. Although many Junior Bar programs have continued in almost undiminished strength since the beginning of the war, it is the hope of Junior Bar leaders throughout the country that the success of the armed forces will be so noticeable in the near future that definite post-war plans can be laid embodying participation by the present members in service in a full program of Junior Bar activities.

Another successful series of traffic court conferences have been held. The North Carolina Conference was held on May 19 at Winston-Salem. In addition to the regular participants, Norman Damon, Automotive Safety Foundation, Harvey D. Booth, National Safety Council, and James P. Economos, Junior Bar Conference, Assistant Attorney General Hughes J. Rhodes, and Associate Supreme Court Justice Emery B. Denny, gave addresses. The New York Conference was held in Syracuse on May 24. Mayor Thomas E. Kennedy, of Syracuse and State Senator Floyd E. Anderson were the local speakers. The Virginia Conference was held in Roanoke on May 26, a Tennessee Conference in Nashville on June 1, and a Missouri Conference in Kansas City on June 6 and 7.

Junior Bar Conference Secretary Hubert D. Henry attended the annual meeting of the Junior Bar Section of the Iowa State Bar Association in Des Moines on June 1, 2, and 3. He addressed the Section on the subject "Traffic Courts" and conferred with the leaders of the Section with regard to the Iowa State Traffic Court Conference to be held on

July 12. William F. McFarlin, chairman of the Traffic Court Committee presided in the absence of the last two chairmen of the Section in the armed forces. The committee on Legal Assistance to the Armed Forces, Howard D. Brooks, chairman, and the committee on War Readjustment, Rosa Lee Snyder, chairman, reported active programs.

The Kansas Junior Bar Conference held its annual meeting on May 26 and elected R. E. Kirkpatrick, Wichita, chairman, Miss Georgia E. Wells, Lyons, vice chairman, and Dorothy D. Tyner, Kansas City, Associate National Director of Procedural Reform Studies, secretary. Mr. Kirkpatrick, by virtue of his election, has become Junior Bar Conference state chairman for Kansas. Frank G. Theis of Arkansas City is retiring chairman.

Albert Bienvenu, New Orleans, has been elected chairman of the Junior Bar Section of the Louisiana State Bar Association, succeeding Arthur C. Watson of Natchitoches. William R. Van Aken, Cleveland, has been elected chairman of the Junior Bar Section of the Ohio State Bar Association. The new council of the section conferred with James P. Economos at the time of the Ohio State Traffic Court Conference. Webster Woodmansee has been elected chairman of the Junior Section of the Milwaukee Bar.

With sixteen per cent of its attorneys in the armed forces, the State Bar of Michigan is preparing to make a survey of the state's legal personnel and needs. The state finds that the demand for lawyers greatly exceeds the present supply. The committee on legal education is preparing to give post-war refresher courses and assist students whose legal education was interrupted to readjust themselves to their studies. The State Bar of Texas is establishing a

loan fund to assist lawyers returning to practice from service, and subsequently to assist law students.

Many Junior Bar members in the United States are planning to attend the Third Annual Meeting of the Inter-American Bar Association to be held in Mexico City July 31 to August 8.

With the annual meeting of the Junior Bar Conference just around the corner, all Junior Bar organizations affiliated with the Conference soon will be preparing reports of the year's activities to compete for the various Awards of Merit to be given to the outstanding organizations. The awards are to be given to state and local Junior Bar organizations for outstanding work in general bar association activity, for outstanding war work, and for outstanding traffic court work. An invitation to submit entries will be sent to all affiliated groups in the near future.

Outstanding accomplishments are often recognized without being acknowledged. However, an acknowledgment of real service is given by *American Law and Lawyers* in its issue of May 30, 1944, in calling attention to the inspired leadership which the Junior Bar Conference is enjoying this year in the form of Jim Economos. The Junior Bar Conference has, in its ten year history, had some notable projects, and with each project a name is attached—something in the nature of a symbol. Certainly it cannot be denied that the Traffic Court work of the Junior Bar Conference, started a year and a half ago, is one of the most far-reaching projects yet carried on by the Conference. It has reached into virtually every state and city. There are, actually, hundreds of persons who have worked on these various conferences and helped to make them successful.

RESULTS OF ELECTION FOR STATE DELEGATES

ON June 3, 1944, the Board of Elections met at the Headquarters of the Association, canvassed the ballots, and announced the results of the balloting for State Delegates. In seventeen jurisdictions delegates were elected for the regular three-year term beginning at the conclusion of the next Annual Meeting. Kansas and Kentucky also voted for delegates to fill vacancies in the term to expire at the conclusion of the next annual meeting. Montana, South Carolina and Texas voted for delegates to fill vacancies in terms to expire at the conclusion of the 1945 Annual Meeting, and Delaware for a delegate to fill a vacancy in

the term to expire at the conclusion of the 1946 Annual Meeting.

In the twenty-one jurisdictions voting, only California nominated two candidates by petition. Of those elected, 13 succeeded themselves in office. There were 11,750 ballots mailed to the members in good standing in nineteen jurisdictions (excluding Hawaii and the Territorial Group) of which 5,035 were returned. There is no report on Hawaii and the Territorial Group at this time as the polls do not close until June 30 for return of ballots from those jurisdictions.

The official report of the results of the election is as follows:

ELECTION FOR STATE DELEGATES—1944

<i>Jurisdiction</i>	<i>Delegate Elected</i>	<i>Received Votes</i>	<i>Ballots Returned</i>	<i>Ballots Mailed</i>
Alabama	William Logan Martin, Birmingham	143	148	272
California	Delger Trowbridge, San Francisco	650	1124	1832
*Delaware	P. Warren Green, Wilmington	51	53	129
Florida	Cody Fowler, Tampa	191	213	612
**Kansas	Douglas Hudson, Fort Scott (Vacancy)	117	124	316
	Douglas Hudson, Fort Scott (Regular Term)	124	131	316
**Kentucky	††T. M. Galphin, Jr., Louisville (Vacancy)	9	60	381
	††T. M. Galphin, Jr., Louisville (Regular Term)	9	67	381
Massachusetts	Frank W. Grinnell, Boston	413	427	1123
Missouri	John T. Barker, Kansas City	373	412	1171
†Montana	Julius J. Wuerthner, Great Falls	73	79	138
New Mexico	Herbert B. Gerhart, Santa Fe	64	64	143
North Carolina	Francis E. Winslow, Rocky Mount	134	144	314
North Dakota	Herbert G. Nilles, Fargo	43	47	63
Pennsylvania	Bernard J. Myers, Lancaster	541	595	1621
†South Carolina	Douglas McKay, Columbia	89	91	183
Tennessee	John T. Shea, Memphis	149	159	396
†Texas	James L. Shepherd, Jr., Houston	455	475	1041
Vermont	Deane C. Davis, Barre	73	73	119
Virginia	Thomas B. Gay, Richmond	227	240	532
Wisconsin	Albert B. Houghton, Milwaukee	283	309	667
		4,211	5,035	11,750

*For vacancy in term expiring at adjournment of 1946 Annual Meeting.

**For regular term and for vacancy in term expiring at adjournment of 1944 Annual Meeting.

†For vacancy in term expiring at adjournment of 1945 Annual Meeting.

††No petition was filed for any candidate in Kentucky. Ballots were therefore sent out in blank, and votes were received for 38 persons for the regular three-year term, and 36 persons to fill the present vacancy. Mr. Galphin received the largest number of votes for each office, as indicated above.

BOARD OF ELECTIONS

EDWARD T. FAIRCHILD, Chairman
WILLIAM P. MACCRACKEN, Jr.,
LAURANT K. VARNUM

WAR NOTES

By TAPPAN GREGORY
of the Chicago Bar

THE April, 1944, issue of *Selective Service*, being Volume 4, No. 4, carries the following comment on page 4:

"Political Activity of S. S. Personnel Limited by Law.

"Since 1944 is an election year, attention of all Selective Service System personnel, both compensated and uncompensated, is directed to provisions of law which govern their political activities. The Hatch Political Activities Act (53 Stat. 1148), the U. S. Civil Service Act, and Civil Service Rules and Regulations definitely limit such activities. All persons affected are presumed to be acquainted with the law and ignorance is not an excuse for violation.

"Uncompensated personnel, which includes members of local boards, are not barred from taking active part in political management or in political campaigns. However, there are provisions against use of their official positions for the purpose of influencing an election, or permitting politics to affect, in any manner, their official acts as members of the Selective Service System. Local boards and other offices of the Selective Service System shall not be used for political meetings, or for planning political activities of any description.

"Compensated personnel are not permitted to take any active part in political management or political campaigns. Among prohibited forms of political activity are: (1) Serving on or for any political committee, party, or similar organization; (2) soliciting or handling political contributions; (3) participating in a political parade, except as a spectator; (4) serving as an officer of a political club or as a member or officer of any of its committees, addressing such a club or being active in organizing it; (5) distributing campaign literature or material.

"In case of doubt, consult your personnel officer prior to engaging in any political activity."

The Lawyers Cooperative Publishing Company and Bancroft-Whitney Company have published in convenient separate form a pamphlet entitled "Domicile or Residence of Persons in the Armed Forces." It is a reprint of the war Section of A.L.R.

The public press calls attention to

a divorce granted to a private in the United States Army stationed in England, on the ground of desertion. A decree was entered by Judge Feinberg of the Circuit Court of Cook County, Illinois. The soldier was represented by Leo Bartoline, co-chairman for Cook County of the Illinois State Bar Association Committee on War Work. The evidence on behalf of the soldier consisted of his deposition and two letters. The same newspaper article states that Judge Dunne of the Circuit Court of Cook County had already moved in a similar direction in granting a divorce to a soldier overseas without even his deposition, based only on the testimony of friends and relatives.

Two interesting items appear in a recent issue of *American Law and Lawyers*. In one of them, reference is made under a New Philadelphia, Ohio, date line, to the action of Tuscarawas County Probate Judge J. W. Lamneck in admitting to probate the will of a deceased soldier without the testimony of any of the three subscribing witnesses. The judge is quoted as saying that in the absence of testimony to the contrary "It will be presumed that a will appearing in legal form and signed at the end by a testator while in the armed forces of the United States was attested and subscribed as provided by law, and that the testator had capacity to make a will and was free from restraint at the time of the execution," and further "where the whereabouts of subscribing witnesses to a last will and testament cannot be ascertained and their signatures on the will cannot be proved, the Probate Court in the absence of other testimony can admit such a will to probate if two or more witnesses testify that the signature of the testator appearing on said instrument is genuine."

Clement F. Robinson, chairman of the Committee on War Work of the

Maine Bar Association, who has been carrying probably more than his share of the load, says:

I got my greatest thrill when a man showed up one Sunday with the information that he had forty-eight hours leave on landing in New York to come down to Portland, Maine, to consult with me. At Recife, Brazil, he had received a threatening letter from Portland which he referred to his legal adviser on shipboard, and as he said: "He took a little book out of his pocket, and said that if when I got ashore I would go right down to Portland, Maine, there was one Clement F. Robinson located there who would fix me up."

Another pleasant thrill was when one of the big shots in the USN came and called on me a short time ago in connection with his transfer to command a vessel in the Southwest Pacific. He said he wanted to come and express his appreciation of the good work that we are doing for the men in the Navy.


And that is about all: we will stay on the job.

The *Bulletin of the State Bar Association for Wisconsin* for May, 1944, contains the following opinion by Ronald A. Drechsler, as to the validity of absentee marriages in Wisconsin:

Both parties must be present before the officiating person to be married by him in this state. An absentee marriage would not be valid, the one party being in this state and the other outside the state, though represented by proxy, or speaking by telephone, radio, etc.

If marriage is a civil contract, where the marriage is performed as follows: one party, officiating person, and witnesses (if these are required) outside Wisconsin, and the other party in Wisconsin represented by proxy, speaking by telephone, radio, etc.—and thus the formal requisites of that place outside Wisconsin are thus complied with; the marriage would be recognized as valid in Wisconsin.

The conclusion was based upon language contained in Sections 245.01, 245.12, 245.15, and 245.21 Stats.; also the cases of *Owen v. Owen* (1922), 178 Wis. 609, 614, and *Lyannes v. Lyannes* (1920), 171 Wis. 381.



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BATTLECRY OF DEMOCRACY

(Continued from page 396)

We in America have inherited this great democratic tradition. Our early forbears, who broke the ties with those homelands in whose soil their ancestral roots were deeply embedded to establish life anew in a strange and remote continent, were

inspired by the independent and self-reliant spirit of the pioneer, and by a hot and jealous love of liberty. The history of the establishment and growth of our democratic institutions eloquently reflect the enfoldment of that free and creative spirit. John Morley quotes Gladstone as saying that he was often asked for advice by young men concerning the objects of study, and that he had bade them study and ponder, first, the history and working of freedom in America; second, the history of absolutism in France from Louis XIV to the Revolution. How better can one contrast life under the two fundamentally irreconcilable philosophies of existence!

In these momentous times it is good to turn for further inspiration to an incident in the story of those among whom our ideals originated. When an emissary of the mighty and despotic Persian ruler Xerxes visited Athens to solicit an alliance by the offer of a territorial bribe—so remi-

niscant of Hitler's technique—the Athenians replied: "We know as well as thou that the might of the Persians is many times greater than ours, so that thou needest not to charge us with forgetting that. Yet shall we fight for freedom as we may. To make terms with the Barbarians seek not thou to persuade us nor shall we be persuaded. And now tell Mardonius that Athens says, 'So long as the sun keeps the path where now he goeth, never shall we make compact with Xerxes, but shall go forth to do battle with him, putting our trust in the gods that fight for us and in the mighty dead, whose dwelling-places and holy things he hath condemned and burned with fire.'"

In this spirit America has taken up the gauntlet thrown down to democracy and is answering its implacable and ruthless foes not only in stirring words but with a united front, unprecedented endeavor, and high and heroic action.

BAR ASSOCIATION NEWS

The State Bar of Arizona

THE Eleventh Annual Meeting of The State Bar of Arizona was held April 28, at Phoenix. The meeting was well attended.

T. J. Byrne of Prescott was elected president, to succeed Matt S. Walton. Byron Thompson of Tucson, and Orrin C. Compton of Flagstaff, were the vice presidents elected. James E. Nelson of Phoenix was elected Secretary, and Stanley A. German of Phoenix, treasurer.

A welcoming address was delivered by the Honorable Sidney P. Osborn, Governor of the State, who spoke on the responsibility of the lawyer to the public, and particularly on the lawyers' peculiar responsibility to the state, at this time, when it is entering upon an era of great de-



T. J. BYRNE
 President, State Bar of Arizona

velopment.

Byron G. Thompson of Tucson then paid his respects and those of the Bar to the Governor, and spoke on the subject of Administrative Law and Procedure. The morning session closed with a splendid, well-considered talk on lawyers' responsibilities, given by the Honorable Levi S. Udall, judge of the Superior Court for Apache County of Arizona.

The visiting members of the Bar were entertained at luncheon by the Maricopa County Bar Association, at which time Robert Daru of New York spoke on the ethics in the practice of criminal law, and James Economos of the Junior Bar spoke on Traffic Courts.

At the afternoon session, resolutions were adopted on constitutional principles for world order.

The meeting was concluded by a dinner dance. Matt S. Walton, retiring president, was toastmaster, introducing the Honorable C. C. Faries, judge of the Superior Court for Gila County, and the Honorable M. G. Hall of the Superior Court of Pima County. Albert Garcia, on leave from the South Pacific, and Deputy-Attorney-General from Arizona, spoke on the soldier's problems.

Bar Association of Arkansas

The Bar Association of Arkansas held its forty-seventh annual meeting at Hot Springs National Park on May 12 and 13.

The major program consisted of an address, at two sessions, by Dean E. M. Morgan of the Harvard Law School entitled "Noteworthy Features of the American Law Institute Code of Evidence."

At the annual banquet Honorable John T. Barker, former president of the National Association of Attorneys General, delivered an interesting and stimulating address on the subject of "Great Lawyers."

The second day's session began with a detailed report of the Association's Committee on War Work by its chairman, A. L. Barber. The report was followed by an address by Col. Julien C. Hyer, Staff Judge Advocate of the 8th Service Command, on "Legal Assistance to Members of the Armed Forces."

The report of the Committee on Legislation, headed by E. J. Butler, of Forrest City, recommending among other things the creation of a committee on drafting for the legislature and a bill officially recognizing and supporting the work of the National Conference on Uniform Laws, was unanimously approved. A resolution calling for the appointment of a special committee to attempt again to secure integration of the Bar through the Supreme Court was also unanimously approved.

Officers elected for the current year of 1944-45 were: president, E. A. Henry of Little Rock, vice president, James D. Head of Texarkana, succeeding E. A. Henry, and secretary-treasurer, Terrell Marshall of Little Rock, reelected.



E. A. HENRY
President, Bar Association of Arkansas

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reach,
Yet urged in words of high and
bold pretense,
As if the sound made up the lack
of sense.
O! could but lawyers know the
great relief,
When reasoning comes, close,
pointed, clear, and brief.
When every sentence tells, and, as
it falls
With ponderous weight, renew'd
attention calls,—
Grave and more grave each topic,
and its force
Exhausted not till ends the
destined course,—
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